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ABSTRACT

This monograph examines recent legal developments in education and their impact on federal policy as well as ways in which the legislative and executive branches can facilitate rather than impede state compliance with court mandates. While organizing the discussion under the broad headings of "Equal Educational Opportunity," "Protection of Individual Rights of Students and Teachers," and "Collective Bargaining," the monograph deals with a wide range of topics including school finance reform, public aid to parochial schools, exclusion of the handicapped from public education, race and sex discrimination, equal educational opportunity for pupils with varying needs, procedural due process for students and teachers, legal liability of school officials, and limitations of the judicial process. (Author/IRT)

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# THE COURTS AS EDUCATIONAL POLICYMAKERS AND THEIR IMPACT ON FEDERAL PROGRAMS

PREPARED FOR THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

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## PREFACE

This Rand report is a revised and expanded version of a paper presented at the Symposium on the Federal Interest in Financing Schooling, sponsored by The Rand Corporation's Center for Educational Finance and Governance and held at Rand's Washington Office on September 23-24, 1976. The original version was discussed extensively at the symposium by the approximately 30 researchers and policy analysts who attended, and the present version reflects their comments and suggestions. In the near future, the symposium papers, and a summary of the proceedings, will be prepared for distribution as a single Rand report. That report will include an abridged version of this report, plus the following seven symposium papers:

Stephen Barro, *Federal Education Goals and Policy Instruments: An Assessment of the "Strings" Attached to Categorical Grants in Education*

Paul Berman and Milbrey McLaughlin, *Federal Support for Improved Educational Practice*

Lawrence L. Brown, III and Alan L. Ginsburg, *A Federal Role in the General Program of School Finance*

John J. Callahan and William H. Wilken, *The Federal Role in School Financing: A View from the States*

Stephen Carroll, *The Federal Influence on the Production and Employment of Teachers*

Robert J. Goettel, *Federal Assistance to National Target Groups: The ESEA Title I Experience*

Michael Timpane, *Federal Aid to Education: Prologue and Prospects*

The work of the Center for Educational Finance and Governance is supported by the Office of the Assistant Secretary for Education, U.S. Department of Health, Education, and Welfare. The author of this paper is a Professor of Law at Duke University, Durham, North Carolina. All views expressed herein are the author's own and do not necessarily reflect the views of Duke University or the sponsoring agency.

## SUMMARY

Educational policymaking traditionally has been the sole prerogative of state and local public school authorities, although Congress, under the "taxing and spending clause" of the Constitution, does have the power to provide funds for education to states and localities, and to require that certain conditions be met to qualify for or to retain these funds. At almost the same time as the legislative and executive branches of the federal government began to expand their involvement in education--during the late fifties--federal courts also assumed an increasingly significant policymaking role in education. Initially, the courts were concerned almost entirely with school desegregation, but later, the judicial branch became involved in many other areas of educational policy, such as school curriculum, freedom of expression and other student rights, exemptions from state compulsory school attendance laws, school finance reform, bilingual or English-language instruction for those of limited English-speaking ability, school personnel policies, student discipline, education for the handicapped, discrimination on the basis of sex, tracking and classification of students, and certification and credentialling of teachers. Thus, the focus of the courts has been both on educational equity and on the protection of individual freedom.

A number of problems stem from judicial involvement in educational policy. Often, the impact extends beyond the immediate case and litigants before the court. Political priorities with regard to budgeting and choices among competing public services are at times constrained by court decisions, and these constraints may affect the ways in which the federal government addresses certain issues. On the other hand, federal legislative and executive decisions may impede state compliance with court decrees. This monograph examines recent legal developments in education and their impact on federal policy as well as ways in which the legislative and executive branches can facilitate rather than impede state compliance with court mandates.

School Finance Reform. Intrastate disparities in educational resources is the first area of educational policy discussed. Often

federal programs indirectly impede state efforts to develop equalizing school finance formulas. Even if federal aid were equalizing, the amount of federal funds is too small to affect the existing revenue distribution pattern. Moreover, reform is costly since equalizing usually means the "leveling up" of poor districts rather than reducing the spending levels of the wealthier districts. It is suggested that the federal government re-evaluate its aid programs and revise those which impede state reform efforts; provide larger-scale assistance to those states implementing court-ordered or voluntary reforms; and promote research on more sophisticated formulas which would recognize the differences between states and between districts within a state.

Public Aid to Parochial Schools. Recent Supreme Court decisions on aid to parochial schools indicate that it may be unconstitutional to use Title I-funded public school personnel to provide auxiliary remedial services to educationally deprived children in parochial schools. The only constitutional approach appears to be dual enrollment and neutral site instruction for such remedial services.

Exclusion of the Handicapped from Public Education. The courts (and now federal law) have said that the state has an "obligation to place each mentally retarded child in a free, public program of education and training . . . ." The fiscal impact on school systems will be substantial. Both courts and the federal law indicate a priority for "mainstreaming." Without additional funds and trained personnel, it is likely that a child will be placed in a regular program without the supportive services he needs. This may be more detrimental to him and to other students in the class than leaving him in a special education class. Technical assistance and teacher training should be provided by the federal government. The government should also aid in the development of better tests and mechanisms for identifying the mentally retarded, the learning disabled, and the emotionally disturbed than now exist.

Equal Educational Opportunity for Pupils with Varying Needs. A number of cases have implied that educationally disadvantaged students are constitutionally entitled to some form of "compensatory" education. Mentally retarded students are seeking education "appropriate to their needs" and "linguistically" handicapped students want the state affirmatively to overcome their language deficiencies.

Race and Sex Discrimination. The difficult questions in the desegregation area are those concerned with the nature and the extent of the remedy ordered, and with re-segregation practices such as ability grouping and the selective use of disciplinary measures. The federal role--apart from the Emergency School Aid Act--has been primarily a negative one, as exemplified by the refusal to allow federal funds to be used for either court-ordered or voluntary busing. Legislative and executive branches should focus on the most effective ways to make school desegregation work, aiding in the development of institutions or mechanisms which can support or supplement the involvement of the courts in drawing school desegregation plans.

The use of *test scores* or other criteria as the basis for certifying, hiring, or promoting teachers or administrators is strictly scrutinized by the courts where it has a disproportionate racial impact *and* the suit has been filed under Title VII of the Civil Rights Act. If only a *constitutional* claim is made, proof of discriminatory *purpose* or *intent* is also necessary, a burden plaintiffs can rarely overcome.

Discrimination against students on the basis of their sex is blanketed by federal law (Title IX); court decisions have had relatively little impact in this area. Discrimination against teachers on the basis of their sex is covered by Title VII.

Protection of Individual Rights of Students and Teachers. Some issues of student rights are covered by federal statutes rather than court decisions. The Buckley Amendment guarantees the right of a student to have access to his own record and not to have personal information about himself disclosed to others. On the other hand, although courts have taken an active role with regard to rules and regulations promulgated by school authorities which impinge upon student or teacher expression and association, decisions in these areas do not have a direct impact on federal education policy.

Procedural Due Process for Students and Teachers. Under certain circumstances, such procedural safeguards as notice and hearing are constitutionally required prior to disciplining a student or identifying and placing a child in a program for the mentally retarded. The high costs of implementing the constitutionally-mandated (or mandated by statute) procedural safeguards may affect other programs and policies

of the state. The federal government should provide school districts with funds and technical assistance--including counsel and special experts--to enable them to establish effective and efficient procedural safeguards.

With regard to the right of teachers to a notice, hearing, and other procedural safeguards (before termination of their employment), recent Supreme Court cases suggest a much greater deference to state and local law and local officials than heretofore.

Liability of School Officials under Wood v. Strickland. Potentially, the most substantial impact on the school system is *Wood v. Strickland*, which holds that a school board member is liable for damages "if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the student affected." It is unclear to what extent the burden is on school authorities to know what the state of the law is and to seek out legal advice before they act. The degree to which this will affect the way in which school officials operate or will inhibit citizens from serving on boards of education is uncertain, and there appears to be little direct impact on federal programs or policies as a result of this decision.

Collective Bargaining. The effort which has been mounted to amend the National Labor Relations Act to extend collective bargaining rights to state and local employees has been dampened by *National League of Cities v. Usery*. That decision held that the "state sovereignty" doctrine (which includes the "states' abilities to structure employer-employee relationships") could be superseded by Congress acting under its commerce clause power only in an emergency or exceptional circumstances. Whether such a law could be enacted under the "spending clause"--*i.e.*, making it a condition for the receipt of federal funds--is not yet clear.

Limitations of the Judicial Process. The courts have impinged on the autonomy of educational decisionmakers for the protection of individual freedom and the attainment of equality, and under our constitutional system, must continue to do so. Often, however, courts need assistance in evaluating and interpreting unfamiliar social science data provided by the litigants, and in obtaining relevant data *not*

provided by either of the parties. Courts also need assistance in ascertaining the nature and extent of the impact of the remedy on those individuals and institutions not a party to the case. A "judicial impact statement" on alternative remedies and their effects might be prepared by a panel of "neutral" social scientists and other appropriate persons which would ascertain the remedy which has the least adverse impact on those groups affected by the litigation but not party to it, yet one that achieves a just result for the plaintiffs whose constitutional rights have been violated. Finally, courts need to be made aware of what they *cannot* do. For example, educators do not know how to equalize educational *outcomes*. Therefore, courts, even with a panel of "experts," are not in a position to do better. Courts should not elevate either heterogeneous or homogeneous ability grouping, either "mainstreaming" or special education for the handicapped, to a constitutional principle.

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# I. INTRODUCTION

Educational policymaking traditionally has been the sole prerogative of state and local public school authorities. There is no express constitutional basis for the federal government's involvement in what is principally a state function, although Congress has the power under the Constitution's "taxing and spending clause"[1] to provide funds for education to states and localities and to require that certain conditions be met in order to qualify for or retain these funds.[2] While the importance of education has been recognized by the federal government from the beginning,[3] it was not until the late fifties that efforts to expand the federal role in education were initiated,[4] culminating in the passage of the Elementary and Secondary Act (ESEA) in 1965.[5] Thus what was once considered exclusively a state and local responsibility came to be shared with the federal government.

From one perspective, however, the federal government still plays only a relatively minor role in education. Of 67.9 billion dollars spent annually for public elementary and secondary education, the federal share is only 5.3 billion dollars or 7.8 percent.[6] But the federal money has a larger impact than the proportion of total educational dollars it constitutes suggests. Federal aid, rather than being in the form of general aid to education, is directed at specific national priorities such as greater equity for certain target groups[7] or educational reform and innovation.[8] The federal government is seen as the appropriate level both for attaining greater equity for minority interests and for stimulating educational reform, since state and local governments respond to the pressures of the majority. The use of categorical funds has given the federal government the leverage to play a significant role in educational policy, particularly in the aforementioned areas of equity and reform. Categorical aid to various target groups, such as the economically disadvantaged, the handicapped, and those with limited English-speaking ability now amounts to more than half of all federal aid to elementary and secondary education.[9] With the addition of the funds appropriated under the Emergency School

Aid Act for desegregating school districts, the amount of federal money directed toward attaining educational equity is nearly two-thirds of the total spent on elementary and secondary education. And this amount will be nearly doubled with the projected appropriations under the new Education for All Handicapped Children Act.

Among the remaining federal aid programs, most--such as the demonstration and innovation projects of Title III of ESEA or the grants for the improvement of state and local planning--are directed at educational reform. There is little general federal aid to education, the principal exception being School Assistance in Federally Affected Areas. This program is, in effect, general aid for those school districts "impacted" by families living or employed on non-taxable federal property. Although in the past there has been considerable pressure for a substantial increase in general federal support, it is unlikely that this will occur in the near future.[10]

The federal example has recently produced a growing consciousness among the states of certain population groups that seek educational equity, although credit for this should also be accorded to the development at the state level of more effective target-group lobbies (e.g., those representing handicapped students or students of limited English-speaking ability) and to legal challenges to existing educational practices. A result of this consciousness has been an increase in the number of states with *state*-funded compensatory and bilingual programs and programs for the physically and mentally handicapped, and state school finance formulas with per-pupil weighting to take into account the special needs of certain categories of students.

Federal leverage over educational policy is achieved through the use of incentives--such as planning grants to states to assist them in attaining greater equalization of their school financing systems[11]--or through the use of sanctions if states and localities fail to meet the conditions prescribed by Congress. The federal government's enforcement mechanisms, however, are quite limited--the principal sanction being the termination of funds. Some statutes terminate all federal funds; some just eliminate further payment of funds under the particular Act in question; some occupy a middle position. For

example, for violation of the provisions of the Family Educational Rights and Privacy Act of 1974, all federal payments going to the agency or institution are terminated.[12] By contrast, the sanctions for violating the provisions of Title I of ESEA are that no further Title I payments will be made. The same is true of the Emergency School Aid Act, which provides that ESAA funds are to be terminated. An intermediate type of provision is represented in the Education for All Handicapped Children Act of 1975, which provides for a cutoff of its own funds, of payments under the Elementary and Secondary Education Act, or under the Vocational Education Act of 1963 to the extent such funds are used to aid the handicapped. Because the only real sanction is so draconian in nature, often injuring most those the legislation was designed to help, the enforcement mechanisms are seldom invoked. Clearly, this is a major reason why minorities and other aggrieved groups or individuals have turned to the courts in seeking the dual objectives of educational equity and reform. Thus the courts can be seen as another instrument of federal policy. As equity for minorities and the disadvantaged is a major objective of the legislative and executive branches (e.g., Title I of the Elementary and Secondary Education Act), so it is also for the courts.

The beginnings of the federal thrust toward equity and reform: The first major federal legislative effort to stimulate *educational reform* was the National Defense Education Act, which for the first time asserted a *national* interest in the *quality* of education that states and localities were providing.[13] The federal government's concern for equity was reflected in the provisions of the Vocational Education Act of 1963, which provided aid for disadvantaged and handicapped students.[14] Civil rights and anti-poverty measures adopted in 1964 also had important implications for equity in education.[15] In 1965, the dual goals of equity and educational reform were brought together in the Elementary and Secondary Education Act, with Title I[16] of that Act focused on compensatory education for economically disadvantaged students and Title III[17] on innovative and demonstration programs.

The federal courts began to assume a significant policymaking role in the field of education at about the same time that the legislative and executive branches of the federal government were expanding their involvement in education. The intrusion of the courts into areas of educational policy in the last two decades has been unprecedented and it has much more directly challenged the primacy of the educational bureaucracy than the actions of the executive and legislative branches. The opening wedge was *Brown v. Board of Education*,[18] and for the remainder of the fifties, the courts were primarily concerned with implementing the constitutional requirement that no student be denied an equal educational opportunity because of his race. While their involvement in the dismantling of dual school systems has continued unabated,[19] the courts have also become involved in other areas which long had been the prerogative of school authorities.

In just the last eight years, the United States Supreme Court has reviewed cases involving nearly every major area of educational policy: school curriculum questions,[20] student rights of free expression and of nondisruptive protest,[21] exemptions from state compulsory school attendance laws,[22] school finance reform,[23] school desegregation,[24] bilingual or English-language instruction for those with limited English skills,[25] school personnel policies,[26] student discipline,[27] and liability of school officials for violating the civil rights of students.[28] The involvement of the lower federal courts and of state courts in education has been even more pervasive. Among the equal educational opportunity issues litigated in these courts, beginning in the late sixties, are unequal resources for poor school districts[29] and poor school children,[30] the failure to provide appropriate education for the handicapped,[31] discrimination in admission to schools[32] or to particular programs on the basis of sex,[33] and the tracking and classification of students.[34] Courts have also become involved in accountability questions--whether a school system which fails to provide an average child with the basic reading, writing, and computational skills should be considered guilty of educational malpractice and held liable for damages.[35]

The constitutional rights of teachers also expanded during the period of the sixties and early seventies--encompassing such diverse areas as free speech,[36] mandatory maternity leave,[37] and the ways in which teachers are certified.[38] The growth in power of teachers' organizations, manifested by the substantial number of states which have recently adopted laws permitting collective bargaining,[39] was also a development of the sixties. As teachers increasingly move toward unionization, new questions in the education field involve not only the right to bargain collectively and to strike or apply other sanctions, but the right to bargain about various aspects of educational policy. This brings into focus the broader question of the legal rights of various competing groups and individuals to control public education decisionmaking--including school boards, school administrators, municipal officials, teachers, parents, students, community leaders, federal and state agencies, and courts.

The efforts of the courts have been directed principally toward the protection of individual freedom and the attainment of equality. In the first instance, the countervailing factor is concern for the stability and order of the educational enterprise; in the second instance, differing conceptions of equality.

Both the judicial decisions and federal legislation have reflected not one, but several concepts of equity. Equity or equality of educational opportunity, for example, can mean nondiscriminatory treatment for all school children, regardless of race, sex, income, or geographic location. In some cases, this seems to call merely for equal *access* to school resources while in other cases, resources may be allocated unequally as long as the varying needs of school children are met in such a way that equal educational *outcomes* are the result. This latter definition requires an affirmative effort on the part of the schools to overcome deficiencies in the students.

With many of the educational equity issues, those groups concerned with perceived inequities were initially unsuccessful in persuading the state political system--the legislature, the governor, the educational bureaucracy--to respond to their claims. Thus, they turned sometimes to the Congress and sometimes to the judiciary--primarily the

federal, but on occasion the state, although the challenges to the existing system generally were framed in terms of federal constitutional requirements.[40] These challenges resulted in a shift in political action, producing either federal or state legislation and sometimes both.

The limitations on the judicial process in the area of education: Although the involvement of the courts in certain areas of educational policy has been criticized by some as an inappropriate usurpation of the policymaking functions of school authorities, it should be recalled that the judicial decisions have addressed racial and other forms of discrimination, civil liberties, the separation of church and state, the right to a fair hearing before being deprived of an education or a job, and other fundamental rights. Where violations of the Fourteenth Amendment's equal protection or due process clause or the First Amendment's establishment of religion or its freedom of speech clause are alleged, the courts cannot refrain from entering the area and deciding the specific case before them.

When equity objectives are seen as increasing social as well as real costs and adversely affecting the education of the majority, the political institutions may place a lower priority on such objectives, whereas courts, whose task it is to protect "discrete and insular minorities" may well move counter to the political institutions.[41]

Moreover, litigation often does not initiate an issue but reflects movements and trends in society. The students' rights movement, which peaked at the height of the hostility to the Vietnam War, has subsided so that the number of cases concerned with the suppression of student protests and with hair regulations has declined as the number of cases involving disciplinary measures has increased. The rapid increase in the organization of teachers and the increase in the jurisdictions which collectively bargain with them have led to more frequent litigation. The plethora of government regulations, partly in response to Congress's failure to eliminate what are all too frequently deliberate ambiguities in the law, also provokes litigation until the ambiguities in Congressional intent are clarified.

To the extent that the state political system ultimately resolves claims of inequities by adopting legislation responsive to the judicially declared constitutional standards, the role of the courts has been to draw attention to certain inequities. Without the support of the judiciary those pressing such claims had been unable to obtain the attention of the political system; with the support, legislative remedies were achieved. Thus, the federal courts in many respects should be seen as but another instrument of national policy--with all three branches of government working toward those policies which will best attain the objectives of greater equity and fairness for various groups neglected by society.

This is not to imply that there are no problems stemming from judicial involvement in the area of education. In many cases the impact of such involvement extends far beyond the immediate case and the litigants before the court, in ways that are often not apparent to the court. In other cases, the information available is not complete or easily analyzed by an inexpert judge, and thus the development of the most effective remedies is impeded. Whether the legally mandated reforms resulted in benefits for the particular parties before the court or the classes they represented is beyond the scope of this monograph. The possible impact of the recent spate of education decisions on other groups not immediately before the court will be considered, however, with the most obvious impact being on the allocation of resources.

Education must compete with other public services, such as criminal justice, welfare, and environmental protection, for a limited number of taxpayer dollars. Various interests within the education area must also compete: the proponents of bilingual education with those of special education for the handicapped; the vocational or career education advocates with those seeking greater emphasis on the college preparatory curriculum; those backing compensatory education with those reasserting a demand for education for the gifted. When a court orders a particular remedy, it does not have before it either information as to the total amount of resources available or information on the competing claims for those resources. Moreover, even if the court had this information, it has no appropriate mechanism

for establishing a system of priorities among the competing claims; that is a function of the political process. Thus the judicial process is limited in the extent to which it can resolve such issues. On the other hand, federal funding decisions by Congress and the Executive may have an impact on the allocation of resources mandated by the courts under the Constitution. Such decisions by the political branches of the federal government may distort state legislative and administrative allocations made in compliance with court orders.

Apart from the budgetary impacts, what effects have these recent decisions had? One effect--already suggested--has been to increase the involvement of state legislatures in the formulation of educational policies. Another has been to impose on the school system constraints that may affect the teaching and learning processes. Some of these constraints may affect the ways in which the federal government addresses certain educational issues. In the remainder of this monograph, the recent legal developments in education will be described and analyzed. The tensions stemming from the increasing involvement of the courts in educational issues that were once left to state and local governments will be briefly outlined. Some of the potential impacts of these court decisions on federal policies and programs will be suggested. How the legislative and executive branches can best facilitate rather than impede the states' compliance with court mandates will also be discussed. The judicial pronouncements concerned with the attainment of equality have had and will have a much greater impact on federal policies than the pronouncements concerned with the protection of individual freedom. Although the impact of the latter is slight, some of these cases are briefly discussed because it is felt that they involve significant areas of the law of education with respect to which those who develop and execute federal educational policies ought to be informed. There are many other areas of educational law--challenges to compulsory education laws,[42] religion in public schools,[43] and laws which bar certain categories of people from voting in school board elections[44]--which are not even touched on in this monograph, since judicial pronouncements in these areas have a very tenuous relationship to federal educational policies.

## II. LEGAL ISSUES

### A. EQUAL EDUCATIONAL OPPORTUNITY

#### 1. School Finance Reform

Interdistrict disparities: The question of "equal educational opportunity" has arisen in a number of contexts, the one most readily coming to mind being the right of all students to an education free of discrimination on the basis of race. But students who attend schools with fewer resources than other schools or districts may also have been deprived of an equal educational opportunity. The first major legal breakthrough in school finance reform occurred in 1971 when the California Supreme Court, in *Serrano v. Priest*,[45] adopted the so-called principle of "fiscal neutrality": that education is a fundamental right which cannot be conditioned on the wealth of a child's parents or neighbors. The court had found that the state system of financing education, with its heavy reliance on the local property tax, resulted, even with state subventions, in substantial disparities among school districts in per-pupil revenues, because of the variation in taxable property wealth. Thus the school finance system discriminated against those who lived in low property-wealth districts and was held to violate the equal protection clause.

In reviewing legislation which has been attacked as violating the equal protection clause of the Fourteenth Amendment of the federal Constitution, the traditional equal protection standard of review is the minimal rationality standard.[46] All that need be shown to uphold the legislation as constitutional is that the legislation's objective is a legitimate goal of the state and that there is a rational relationship between the goal sought and the legislative classification. This test presumes the law under attack to be valid, thrusting the burden on the *plaintiff* to show that the legislation is arbitrary or irrational. Legislation is subjected to a stricter standard of review, a more rigid scrutiny, if it classifies on the basis of a "suspect" trait (such as race or nationality) or if "fundamental" interests (such

as free speech or the right to vote) are involved. Under this test, the burden is on the *defendant state* to show that there is a *compelling* state justification for this particular legislative scheme and that the legitimate objectives of the legislation could be accomplished by no less onerous, less discriminatory means.[47]

The California Supreme Court, in reviewing that state's system of financing education, held that classifying districts on the basis of their wealth was a suspect classification, and that education was a fundamental right which could not be conditioned on wealth. Thus the court was able to invoke the strict scrutiny test rather than the weaker rational basis test. Since the state was unable to meet its burden of showing a compelling state interest in the school finance system being challenged, the alleged discrimination was held to be a violation of the equal protection clause of the federal Constitution and the equivalent provision of the California constitution. *Serrano* was then remanded for trial in accordance with the legal principles articulated by the state supreme court.

Following the *Serrano* victory, 52 actions were filed in 31 states, with federal court decisions in three states[48] and state court decisions in six more.[49] With little variation, these courts--with the exception of those of New York and Maryland--followed the legal analysis articulated by the *Serrano* court. In one of the federal court cases, *San Antonio Independent School District v. Rodriguez*, the state appealed to the Supreme Court and on March 21, 1973, a five-to-four decision was handed down, holding that the Texas school finance system, while in need of reform, did not violate the Fourteenth Amendment.[50] The Court held that the Texas system for financing schools did not discriminate against any definable class of poor persons, and that education was not a "fundamental right," since it was neither explicitly nor implicitly guaranteed by the Constitution. Applying the more lenient rational basis test, the Court found that the Texas system rationally furthered a legitimate state purpose--that of local autonomy.

This decision halted the first phase of the school finance reform movement. While at first glance it seems that the courts are now closed to any school finance reform litigation based on the equal

protection clause of the Fourteenth Amendment, a close examination of some of the dicta in the majority opinion of *Rodriguez* indicates that it might be possible to bring a successful lawsuit on Fourteenth Amendment grounds. The Supreme Court found that there is no "interference with fundamental rights where only relative differences in spending levels are involved,"[51] thus rejecting the educational "input" measure of equality of educational opportunity (e.g., dollars, physical facilities, teacher-pupil ratios). Instead, a "minimum adequacy" standard was taken as the appropriate measure of equal educational opportunity. The Court found that there was no evidence that the Texas system did not provide "an adequate minimum educational offering in every school in the State,"[52] and suggested that if it could be shown that the plaintiff school children suffered "an absolute denial of educational opportunities" or that the school district was unable, for fiscal reasons, to teach the "basic minimal skills,"[53] a Fourteenth Amendment claim might be successful. It is unlikely, however, that a case will arise in the foreseeable future with the requisite factual basis for successful prosecution of such a suit.

But the school finance reform movement did not come to a *total* halt. The *Serrano* case and its progeny had exposed the inequalities in school finance systems and it was difficult to sweep the issue back under the rug. State courts were still an available forum, and state constitutional provisions could be the basis for a legal challenge.[54] Less than a month after the *Rodriguez* decision, the New Jersey Supreme Court held that New Jersey's school finance statutes violated the New Jersey constitution, which commands the legislature to provide a "thorough and efficient system of free public schools."[55] Suits were soon brought in various state courts around the country alleging that the state systems of financing education were in violation of the *education clauses* of their state constitutions.[56]

In some states, the state *equal protection clause* rather than (or in addition to) the education clause was relied on by the plaintiffs in their challenge to the financing system, since unlike the federal Constitution, nearly every state constitution contains an explicit educational provision. Thus the *Rodriguez* Court's holding that education is not a fundamental right because it is not explicitly or even

implicitly mentioned in the federal Constitution need not necessarily impede a state court's finding with regard to the fundamentality of education based on its own constitution. Indeed, the *Serrano* trial court, when the case was remanded, held that under the California constitution education was a fundamental right, thus requiring the state to show a compelling interest in order to permit this right to be conditioned on district wealth.[57] This the state was unable to do. In Connecticut, a state trial court relied on *both* state constitutional provisions, finding that the system of financing education was not "'appropriate' legislation" under the state's educational provision,[58] and that under the state's equal protection clause, education is a fundamental interest and the financing system was a denial of equal protection.

Reforms: As a result of the post-*Serrano* litigation, a number of states significantly reformed their school finance systems. Thus, the reform efforts quickly shifted from the courts to state legislatures. Many of these reform measures were enacted in the 1972-1973 period, before the Supreme Court's decision in *Rodriguez* and during a period in which many state treasuries had an unanticipated surplus.[59] Many of the reforms were significant; they included substantial increases in the level of state aid, relief for local tax burdens (both for the low property-wealth districts, through lower rates, and for the individual taxpayer, through circuit-breaker provisions),[60] and greater equity in the distribution of revenues, with formulas which adjusted for cost-of-living differences,[61] weighted pupil-formulas to take into account special, higher-cost needs of certain types of students,[62] and restrictions on local school budgets--either through ceilings on the tax rate or on the expenditure level.[63] In some states, the effects of these reform measures were diluted by enacting save-harmless clauses and minimum grant provisions, by failing to reform the administration of the property tax, by failing to recapture "excess" levies from wealthier districts, and by allowing voter overrides of statutory limits on expenditures or tax rates.[64]

After the first round of school finance litigation, it had become apparent that many of the proposed reforms were too simplistic. The fiscal neutrality or wealth-free standard, devised in response to

a system in which low property values correlate with low per-pupil expenditures, fails to recognize the fiscal problems of central city schools, problems that stem not from low property values, but from higher costs for both education and other public services.[65] A better understanding of what the purchasing power of the educational dollar is in different localities was needed, so that educational resources rather than absolute dollars would be equalized. The four largest cities in New York State (New York City, Rochester, Buffalo, and Syracuse), intervening in *Board of Education of Levittown v. Nyquist*,[66] are now raising this issue. They also argue that large urban school districts are incapacitated by heavy municipal overburden,[67] and that this factor should be taken into account in any new finance scheme.

The current situation: After many decades of unsuccessful attempts to bring about changes in the ways in which schools are financed through the states' political systems, the initial judicial reactions were favorable. With the Supreme Court opinion in *Rodriguez*, however, a federal Constitutional basis for attacking state school finance systems was eliminated. The reform momentum was such, however, that litigation continued in a number of state courts, and several state legislatures--even without a court mandate--are considering various reform proposals. Moreover, as will be discussed below, there were several federal legislative initiatives in the area of school finance equalization, the one successful initiative being § 842 of the Education Amendments of 1974, providing federal support for states drafting equitable school finance plans.

The school finance reform movement has slowed down to some extent, however. What are the reasons? First, there have been a number of legal reverses in some of the states where the school finance systems have recently been challenged.[68] And in some states, newly enacted reform legislation has been attacked as unconstitutional by those who oppose the reforms.[69] But the major reason why reform has slowed down is that it is costly. To equalize per-pupil expenditures within a state, it is necessary to add save-harmless clauses for wealthier districts and to "level up" the poorer districts in order to make the reform politically palatable; this requires the state to spend much more for education than in all likelihood is currently being spent.

By way of illustration, while the *Serrano* trial was under way, the California state legislature enacted a law which provided an additional $200 million for education and $220 million in tax relief for school districts. The trial court, however, found that this statute, S.B. 90, and a related statute, A.B. 1267, were still unconstitutional. The California State Board of Education subsequently proposed a plan[70] which it deemed would fully comply with the *Serrano* trial judge's order--that the per-pupil expenditure differential between districts be reduced to "amounts considerably less than $100 per pupil."[71] It was estimated that this 1975-76 plan would cost the state an additional $537.4 million more than the amounts included in S.B. 90 and A.B. 1267. One effect, then, of the *Serrano* decision is to force a reordering of priorities at the state level. The state is not given "credit" toward compliance with the *Serrano* mandate if, for example, it fully assumes the cost of teacher retirement, formerly an expense of the districts. Nor does state categorical aid for programs for the handicapped or gifted, for bilingual education, driver training, or remedial reading count toward compliance with the decision since categorical aid does not "equalize." To be in compliance with the court decree, the state will have to put more of its tax dollars into general aid than it otherwise might have, potentially shortchanging various groups such as the handicapped or educationally disadvantaged. This, then, is an illustration of the tension that can be created by a court order in response to one type of complaint, compliance with which has an effect on a wholly different group not party to the litigation.

As is evident from the foregoing, the cost of implementing new finance systems is massive. At the same time, however, the state treasury surpluses have shrunk. And with less money available, legislators have become concerned about spending money where it will have the most impact. The debate over whether "dollars make a difference"--that is, whether when the finance system is reformed, education will be improved--continues, and is now going on in the courts as well as legislatures. While the courts have reached no definitive conclusions, they have pointed in directions which directly affect the outcome of the debate for legislators. In *Robinson v. Cahill*, the New Jersey trial court found that there was a "correlation between educational expenditures and pupil achievement over and above the influence of family and other environmental factors."[72] The court also found that a large

number of pupils were not getting "an adequate education" due to low per-pupil revenues in many poor districts despite high tax rates. In *Serrano*, the California trial court concluded that "a school district's per-pupil expenditure level does play a significant role in determining whether pupils are receiving a low-quality or a high-quality education program."[73]

The New Jersey Supreme Court in *Robinson* and the California trial court in *Serrano* set seemingly different standards as to the equal educational opportunity which the legislature is required to provide under their state constitutions. It should be noted that the California Supreme Court's initial opinion had emphasized taxpayer inequities rather than expenditure inequities. Thus, under the principle adopted by that court, actual expenditures per pupil could vary from district to district as long as the identical tax *effort*--the tax rate approved by each district--produced the same number of dollars, regardless of a district's property wealth per pupil. Upon remand, however, the California trial court seemed to focus almost entirely on expenditure inequalities. For the California trial court, expenditure differences reflect the degree of opportunity provided by the educational system. Its standard is based on inputs (the disparities must be reduced to "amounts considerably less than $100 per pupil"). The state must "provide for uniformity and equality of treatment to all pupils of the state," meaning that "the state may not . . . permit . . . significant disparities in expenditures, between school districts . . . ."[74] No relationship between inputs and outcomes need be shown.

The New Jersey Supreme Court, however, does not require that the remedy be equalization of expenditures. *Robinson v. Cahill*, in holding that the state legislature is constitutionally compelled to provide a "thorough and efficient" education, requires the state to provide a minimally adequate education to all districts--a standard not unlike that suggested by the Supreme Court in *Rodriguez*.[75] According to the New Jersey court, the "thorough and efficient" education guaranteed by the state constitution is "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen, and as a competitor in the labor market."[76] The problem is that neither the New Jersey court nor the majority in *Rodriguez* has provided a way

to determine what minimum level of expenditure would produce an adequate education.[77] In sharp contrast, the *Serrano* trial court indicates that the adequacy of the educational program is constitutionally irrelevant; it is the "quality" of the educational program *relative to* other districts[78] that is the issue.

When the New Jersey legislature failed to reform the state financing system to comply with the court's 1973 ruling, the court ordered the redistribution of the state minimum support aid and the save-harmless funds pending the enactment by the legislature of a constitutional school finance system.[79] The legislature finally adopted the Public School Education Act of 1975,[80] but failed to fund it fully, the cost of providing a "thorough and efficient" education being well beyond available revenues. The only realistic way to fund the Act would be through a state income tax which New Jersey had never succeeded in adopting in the past. The court, therefore, in an unprecedented order, gave the legislature a deadline by which it had to adopt such a tax or face the closing of all New Jersey schools.[81] When the legislature was unable to act by the deadline, the public schools were closed, not to open again until the legislature finally resolved its differences and enacted an income tax.[82]

The federal role: To date, the federal government has played almost no direct role in stimulating school finance reform or in assisting states which are attempting to enact reforms. Indeed, some federal programs can indirectly work *against* state efforts to equalize. In most cases, the principal exception being Title I aid,[83] federal programs are antiequalizing. The provision of the federally impacted areas aid statute[84] which prohibits states from treating such aid as local revenue for purposes of the state distribution formula[85] particularly distorts state equalizing formulas. This provision was enacted after several federal district court cases held that the statute would not permit states to treat such money as local revenue.[86]

A law was recently enacted, however, which allows a state to consider a local district's impacted areas aid payments as local revenue in allocating funds if the state has an "equitable" school finance formula already in effect.[87] The regulations define an "equitable" system as one which the state court has not held invalid and where the

disparity among districts in per-pupil revenues is 20 percent or less, excluding capital outlay.[88] The principal difficulty with the disparity standard is that very few states can qualify. Many states have begun to reform their school finance systems,[89] however, and the inability to coordinate these reforms with federal aid programs such as impact aid can undermine the new laws.[90] When combined with state reforms, other federal aid programs, such as the funds to be disbursed under the Education for All Handicapped Children Act,[91] may also be antiequalizing and distorting.

Even if federal aid programs were equalizing rather than antiequalizing, the federal share of education funds in any state is too small to affect the present inequitable revenue distribution pattern across school districts. As noted at the beginning of this monograph, despite the proliferation of federal programs, the financial role of the federal government in elementary and secondary education is quite minor. A number of proposals have been made, however, to increase the federal government's role,[92] although simply increasing the federal share from less than 8 percent to 20 percent or to even one-third of total educational expenditures need not necessarily bring about greater fiscal equalization at the state level. If this increase results from an expansion of existing federal categorical programs, some state and local money may be replaced, bringing about a reduction in state and/or local taxes. The present federal programs, however, affect both state-local tax burdens and expenditure disparities differently[93] across school districts. On the other hand, distribution of a larger share of federal funds to states as general federal aid rather than in existing categorical programs will also reduce tax burdens, and may or may not alter the expenditure disparities, depending upon the particular state's response.

A number of proposals were made during the period between the first *Serrano* decision and the *Rodriguez* decision, therefore, which called for an increased federal share to be used specifically to reduce expenditure disparities or tax inequalities among districts within a state.[94] Most of these proposals provided for a federal incentive program for equalizing interdistrict expenditure disparities. The

only such program to be enacted, however--and yet to be fully funded--is that provided under § 842 of the Education Amendments of 1974.[95] This law provides that a state may be reimbursed for the cost of developing or implementing a school finance plan. With only very sketchy legislative guidelines--that the plan be "consistent with such standards as may be required by the fourteenth article of amendment to the Constitution," and have as its primary purpose achievement "of equality of educational opportunity for all children"--HEW adopted regulations for an acceptable plan.[96]

The plan must use "an equitable measure of the relative financial abilities" of local school districts and must use procedures "which will ensure uniformity in the measurement of wealth." It must be financed by an "equitable" tax system. The plan must take into account the proportion of pupils with greater educational needs, and the cost differences among districts, "encourage citizen interest and participation in the educational decisionmaking process," and "encourage efficiency in the size and organization of school districts and in the delivery of educational programs." Yet nowhere are these terms defined and there is very little agreement among educators, economists, lawyers, and judges as to, for example, the optimal size of a school district, how cost differences are to be determined, what is required by the Fourteenth Amendment, what is an "equitable" tax system, and what is "citizen participation" in the educational decisionmaking process.

The lack of clarity of these guidelines and the fact that the courts are not in agreement as to what the Fourteenth Amendment requires means that almost any plan submitted can receive approval. Moreover, the total amount of money authorized is far too small compared to the massive amounts really needed for reforming state school finance systems.

One difficulty with any program of federal aid for school finance reform, manifest even in this minor planning-grant program, lies with the setting of a federal equalization standard by which reform is to be measured. When the remedies ordered by the California and the New Jersey supreme courts[97] are compared, it is clear that there is no agreement as to whether equal educational opportunity means tax relief (the equalization of tax burdens) or education resource equity (the

equalization of per-pupil expenditures), or even minimally adequate education rather than equal education. Moreover, the courts will increasingly face the special problems, such as urban cost differences and municipal overburden, raised by the *Levittown v. Nyquist* suit.[98] And there are new problems, such as declining enrollments and increased pension liability which differ among states and districts within states. Finally, federal standard setting is bound to incur significant additional costs which will not be offset by a program involving only small amounts of federal revenue, and thus these costs would have to be borne by the states.

In addition, some states have already enacted progressive reform measures while other states still maintain systems which result in gross disparities among school districts. One program, therefore, would not deal adequately with both kinds of states unless different standards were established, allowing the more progressive states greater leeway after certain criteria were met.

Federal alternatives: In sum, where courts--either state or federal--have ordered state authorities to develop a nondiscriminatory financing system that does not produce the disparities that the system adjudged unconstitutional did, there are several ways in which the political branches of the federal government can work with and not against the judiciary and state legislatures:

(1) Since the state treasury surpluses of many states have diminished and politically feasible reforms require a substantial input of money, the federal government could provide substantially larger-scale assistance to equalize per-pupil expenditures than is now available under § 842. Perhaps a law similar to the Emergency School Aid Act (for desegregating school *districts*) could be enacted for school finance equalization--whether court ordered or voluntary--which would provide funds to assist *states* in adopting and carrying out school finance reforms. Federal "equalization standards" must be sufficiently flexible and varied so as not to penalize those progressive states that have already considerably reformed their school finance laws. There can be no single national equalization standard; school finance reform must be tailored to the characteristics of each individual state.

(2) Federal aid programs such as impacted areas aid should be evaluated to determine whether they are antiequalizing or otherwise impede state reform efforts, and should be revised accordingly.

(3) The federal government could assist states by undertaking research into more sophisticated formulas and disseminating the results. Research should include investigation into cost differentials for the same level of education, the cost of programs for pupils with higher needs, and factors, such as school-district size, which might produce diseconomies of scale.

Intradistrict disparities: A systematic pattern of disparities in per-pupil expenditures on a school-by-school basis within a single district has not been the subject of litigation nearly as often as state financing systems which create interdistrict disparities. In fact, there are only two intradistrict disparity cases of significance--one decided before *Rodriguez* was handed down and the other after.

In *Hobson v. Hansen*,[99] substantial differences in the per-pupil expenditures for teachers' salaries and benefits were found to exist between schools attended by the wealthier, predominantly white students in Washington, D.C., and schools in the low-income, minority sections of the city. Since the school board was unable to advance a compelling state interest justifying this unequal treatment, the court found this to be a violation of the equal protection clause, and ordered per-pupil expenditures for teachers from the regular budget to be equalized within 5 percent in all the District's elementary schools.

Although the case predated the *Rodriguez* decision, it is likely that *Hobson* would have prevailed even *after* that decision, because *Hobson's* holding rests on discrimination on the basis of race--an indisputably suspect classification--as well as on wealth. Even had the discrimination been solely on the basis of wealth, however, the plaintiffs would possibly have succeeded in spite of *Rodriguez*. First, the wealth involved is not district wealth but personal wealth. Thus the system discriminates against a definable group of poor people[100] and may therefore create a "suspect classification," triggering the stricter equal protection standard. Even if the weaker standard is utilized, however, it could be argued that there is no rational basis

for a system which maintains disparities in educational expenditures among schools within a single district. In *Rodriguez*, the Court found that to encourage local autonomy by permitting districts to decide how much to spend on education by selecting their tax rates was a legitimate state purpose, even if the result was substantial disparities among districts. Discrimination among schools within a single district, however, could not possibly serve such a purpose, since it is the central board, not the individual school, that decides how much is to be spent in each school. Thus intradistrict school finance cases *may* be distinguishable from the kinds of interdistrict school finance cases dealt with in *Rodriguez*.

The only significant post-*Rodriguez* case involving intradistrict disparities in school expenditures is *Brown v. Board of Education of Chicago*[101] and in the absence of a racial classification, the court would *not* distinguish the intradistrict suit from *Rodriguez*. The plaintiffs in *Brown* contended that the Chicago school board allocated school funds in a manner which discriminated against nonwhite and poor children. After examining the statistical evidence, the court found that while in earlier years, the average per-pupil expenditure for staffing costs for white schools was more than 8 percent greater than for predominantly nonwhite schools, the disparities had dropped to 1 percent during 1972-73 as a result of the board's efforts to equalize expenditures.[102] The court, noting that the disparities, which were primarily due to the board's teacher-assignment policies, could be due to "administrative convenience, sudden unexpected demographic changes, and response to the special educational need of certain neighborhoods,"[103] applied the weaker, rational-relationship test and held that such disparities were not irrational. The concentration of higher salaried teachers in certain schools was attributed to the city's voluntary teacher transfer policy which enabled the more experienced teachers to transfer to the more "desirable" schools. The court endorsed this policy since it "presumably helps keep these teachers in the Chicago school system, which upgrades the skill level of the system as a whole."[104]

Since the plaintiffs made no showing that they constituted a definable category of poor persons,[105] and since the plaintiffs were not

absolutely deprived of education, the school-by-school disparities in expenditures did not produce any unconstitutional economic discrimination, according to the court. As in *Hobson v. Hansen*, however, the court also had before it a prima facie case of discrimination on the basis of race, the paradigm suspect class, requiring the board to show that there were compelling--not just rational--interests in maintaining the system of teacher transfers. The disparities in expenditures, caused primarily by the board's voluntary teacher transfer policy, since they discriminated on the basis of race, were held to be "constitutionally unacceptable" because neither "administrative convenience" nor "employee desires" are compelling state interests.[106]

What is the impact on the school system of a court decree ordering the elimination of intradistrict disparities and what is the relationship of the court decree to federal program requirements? After *Hobson*, the Washington, D.C., school system is under court order to equalize expenditures, including longevity pay, for classroom teachers in each school (within a 5 percent range of the average per-pupil expenditures for such teachers in *all* schools in the system), or risk having the school board and the superintendent held in contempt of court. The school system is also required by the Title I guidelines to equalize expenditures for all instructional staff, *not* including longevity pay, within a 5 percent range of the average per-pupil expenditures of the system's *non-Title I* schools,[107] or risk losing millions of federal dollars for compensatory programs. In order to comply with the Title I requirements, resources have been shifted around to noncomparable schools on the basis of personnel availability rather than educational need.[108] The school system claims that it cannot comply with the court order and with the federal guidelines at the same time, and there has been no coordination by the federal government between the Title I requirements and the court decree. Superficial compliance can sometimes be obtained with both, but without any educational impact--e.g., by adding nonteaching staff to a school with a very high pupil-teacher ratio, thus adjusting the dollar amount but producing no impact on class size. According to a recent study, the District of Columbia school board has placed its emphasis on equalizing dollars rather than services, and on providing the same level of resources

regardless of the differences in need.[109] Thus, the *Hobson* decision has improved the distribution of dollar resources, but this has often not been translated into real resources, and it is reported that the extensive and disruptive moving of staff without considering the educational impacts has been detrimental to morale.[110] It is clear that coordination of federal legislative and judicial requirements, now lacking in Washington, D.C., is essential.

2. Title I and Aid to Private Schools

Recent decisions of the Supreme Court appear to have sharply curtailed the circumstances under which public aid can be given to nonpublic schools without violating the establishment clause of the First Amendment. These decisions may have an impact on Title I of the Elementary and Secondary Education Act of 1965, which provides funds to disadvantaged children regardless of whether they attend public or private schools,[111] as well as on any federally financed voucher program that includes nonpublic schools. Until the compromise in Title I of giving aid to disadvantaged *children* rather than to *schools* was reached, no sizable program of federal aid to education could be enacted.[112] The Supreme Court's recent opinions suggest that the compromise may not long survive.

In *Meek v. Pittenger*,[113] decided in 1975, the Supreme Court applied its three-pronged test for determining whether public aid for nonpublic education violates the establishment clause.[114] Under this test, in order to be upheld, the law being challenged must: (1) reflect a clearly secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. Using this test, the Court has invalidated a state statute authorizing reimbursement of nonpublic schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects, and a state statute providing a direct salary supplement to teachers of secular subjects in nonpublic schools.[115] More recently, the Court has invalidated statutes providing direct grants to nonpublic schools for maintenance and repair of school facilities, tuition reimbursements to parents of children attending nonpublic schools, and tax "credits" to parents not

qualified to receive the tuition reimbursement because of an income cutoff.[116] The only public aid programs for elementary and secondary schools to survive constitutional attack were those under which textbooks were lent to *all* students in a school district[117] and those where parents of *all* school children were reimbursed for bus fares.[118]

Applying the test, then, to the Pennsylvania statutes under challenge in *Meek v. Pittenger*, the Court found all but the textbook program unconstitutional. Under one of the Pennsylvania statutes, auxiliary programs such as guidance counseling, health services, speech and hearing services, and remedial reading and arithmetic were to be provided to nonpublic school children on the premises of nonpublic schools by public school teachers, counselors, and other public school personnel. The Court held the statute unconstitutional because the state, in order to ensure that such teachers would remain nonideological, would necessarily become entangled with the church.

> To be sure, auxiliary services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority . . . . But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained . . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.[119]

The Title I guidelines for such auxiliary services as remedial reading and arithmetic are quite similar to the provisions of the Pennsylvania statute.[120] Consequently, with the seeming exception of programs providing bus transportation, school lunches, and public health facilities,[121] it appears that Title I-funded public school personnel could not be used to provide auxiliary remedial services to educationally deprived children on parochial school premises, since teachers are not "self-policing" items like books. Yet remedial services are the heart of the Title I program.

If the establishment clause bars the use of Title I-funded remedial teachers in parochial schools, the impact may not only be felt by those schools but by the public schools as well. In an earlier case,[122] the Supreme Court had held that under Title I, state education officials must provide services to parochial school children that are "comparable in quality, scope, and opportunity for participation" to those provided children in the public schools.[123] If the state cannot provide "comparable" services without using public school teachers on private school premises, then it must eliminate the use of on-the-premises instruction in *public* schools, and use "other means, such as neutral sites" for both public and private school students.[124]

Thus, dual enrollment or neutral-site instruction may be the only available option to preserve the heart of the Title I program.[125] However, there are some states, Missouri being the most notable example,[126] where such programs are prohibited by state law. In that situation, according to the Supreme Court, the state has the option of nonparticipation in the Title I program altogether.

Toward the end of last Term, the Court upheld the provision of state aid to several religiously affiliated colleges.[127] It found that colleges, unlike elementary and secondary parochial schools, were not "religion-pervasive institutions"[128] and thus could separate their secular from their sectarian functions for state auditing purposes, nor were the students of "an impressionable age."[129] Thus, unlike *Meek v. Pittenger*, this most recent decision should have little relevance for questions concerning the use of Title I funds in parochial elementary and secondary schools or for voucher or other tuition programs which include such schools.

Federal alternatives: There is thus the possibility that the long-established formula--which permitted the advocates of public aid to parochial schools and those who opposed such aid for political and constitutional reasons to join forces--may collapse. Alternative approaches to distributing Title I aid should, therefore, be considered. Under the established formula, which earmarked Title I aid for disadvantaged *children* rather than general aid for *schools*, it now appears that only dual enrollment or neutral site instruction would be constitutional. In states such as Missouri, however, summer schools at

neutral sites may be all that will survive. If transportation, school lunches, or health facilities are the only services permitted in parochial schools, Title I programs in *public* schools may have to be reduced to comply with federal law, unless the "comparable services" requirement is changed.

3. The Exclusion of the Handicapped from Public Education

The first legal breakthrough for the handicapped came in a pre-*Rodriguez* case, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*.[130] In that state, retarded children could be excluded from the public schools if they had been certified as "uneducable and untrainable" or had not attained the mental age of a normal 5-year-old child. The plaintiffs introduced evidence that *all* mentally retarded persons are capable of benefiting from a program of education and training. Without deciding whether education was a fundamental right, the court concluded that the policy of providing education to normal children while denying it entirely to a substantial number of children with mental handicaps "established a colorable constitutional claim even under the less stringent rational basis test."[131] The parties entered into a consent agreement whereby the state recognized its "obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ."[132]

*Mills v. Board of Education*,[133] another leading case dealing with the mentally retarded and emotionally disturbed, held that the District of Columbia school board, in denying such students an education, violated the statutory policy embodied in the District of Columbia Code[134] as well as the due process clause of the Constitution. The Board of Education's defense was that the scarcity of funds required that educational resources be allocated so as to exclude those children whose disabilities were such as to require very costly programs. The court dismissed this argument, saying that "available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."[135]

Impact of Rodriguez: While the immediate consequence of the *Rodriguez* decision was to foreclose a federal constitutional attack on inequitable school financing statutes, the fact that the Supreme Court failed to hold that education was a fundamental right--since it was neither explicitly nor implicitly guaranteed by the Constitution--threatened the success of all educational reform litigation grounded in the equal protection clause. The *Rodriguez* majority, however, had distinguished the interdistrict financing inequities, which produced *relative* differences in the quality of education, from a state "financing system [that] occasioned an absolute denial of educational opportunities to any of its children."[136] Arguably, then, excluding a class of children such as the mentally retarded from the public schools would violate the equal protection clause of the Fourteenth Amendment on the ground that some minimum quantum of education is a fundamental right.[137] Thus a handicapped child who is entirely deprived of any educational opportunity is arguably distinguishable from the student in *Rodriguez* who is receiving an "adequate" but relatively inferior education. Another approach would be to argue that the mentally and physically handicapped comprise a suspect class since the classifying trait is as immutable as race and national origin.[138]

*Cuyahoga County Ass'n for Retarded Children and Adults v. Essex*,[139] decided this year, seems to be at odds with the *PARC* case. Ohio's statute is quite similar to Pennsylvania's, providing that those who are "incapable of profiting substantially by further instruction" may be excluded from the public schools. In *PARC*, however, plaintiffs had introduced uncontradicted testimony by four expert witnesses who convinced the court that "all mentally retarded persons are capable of benefiting from a program of education and training . . . .,"[140] while the Ohio court heard no evidence and had only a "limited record" before it. The Ohio court thus expressly limited its decision "to matters of facial constitutionality" and, relying on *Rodriguez*, used the more lenient rational basis standard of equal protection to uphold Ohio's statute as constitutional.

Whether the cases can be distinguished on the basis of the ways in which they were presented to the court or on the fact that *Rodriguez* had not been decided when *PARC* was before the Pennsylvania court is

unclear. *Rodriguez's* effect on the question of whether a handicapped child is entitled to a free public education, then, remains in doubt. However, where the constitutional issue is whether the equal protection clause prohibits the *total* exclusion of a child from a publicly supported education solely on the basis of his physical or mental handicap, the distinction between *Rodriguez*, where the concern was unequal per-pupil expenditures, and these cases seems evident.

Even if a minimum quantum of education is not a fundamental right under the federal Constitution and even if the Supreme Court refuses to recognize the existence of any new suspect classifications such as the handicapped, *Rodriguez* may nonetheless not significantly impede litigation in nonschool finance areas. As with the case of interdistrict disparity litigation, the better forum may be the *state* courts. Even though education is not mentioned in the federal Constitution, education is explicitly referred to in almost every *state* constitution and thus may be construed as a fundamental right under the equal protection clause of a substantial number of state constitutions.[141]

One interesting aspect of the handicapped decisions is the extent to which the courts have entered the debate now going on among special education experts. At issue is whether it is educationally better for educable mentally retarded students to be placed in special classes or schools with teachers specifically trained to deal with their handicaps, or whether isolating children from regular school experiences and from "normal" children will reinforce their disabilities and lower their self-esteem. It has been argued that returning handicapped students to the "mainstream" of education by placing such students in regular classrooms and providing supplemental and supportive services will lessen the stigma attached to placement in special education classes and will prevent the psychological and educational harm that can arise from misclassification. There are valid *educational* arguments on both sides and by no means has the debate been resolved.[142] Nevertheless, the courts,[143] and now the recently enacted federal law,[144] have unequivocally come down on the side of "mainstreaming" the handicapped. The courts, however, are ill equipped to decide such policy questions. Moreover, many school districts, lacking funds and trained teachers to provide the support the handicapped child needs in

order to function in the regular classroom,[145] will have problems moving from the theory of mainstreaming the handicapped to its practice.

Costs: What are the likely costs of these legally mandated reforms? What will the necessary tradeoffs with other programs be? Unless additional money is appropriated, either at the state or federal level, to meet the costs implicit in the court orders, the funds available for educating the ordinary student or the sufficiency of funds allocated to equalizing the state education finance formula may be affected. Without additional funds, the setting of group against group may occur.

An idea of the level of funds that might be involved can be gleaned from the *Mills* suit and its aftermath. At the time the suit was brought, there was no accurate count of the number of children who would be affected, as the District of Columbia school system had not conducted the census required by statute.[146] The plaintiffs speculated that as many as 18,000 of the District's estimated 22,000 handicapped children were *not* receiving special education when the suit was brought. A Board of Education study showed that prior to the suit, there were approximately 3,880 handicapped children receiving some publicly supported special education,[147] and according to some rough figures made available by the District of Columbia school system,[148] the special education budget for the 1971-72 year was approximately $7 million.[149] When *Mills* was decided, the number of students served increased to 11,047 while the budget increased to over $10 million. During the school year just completed, the number of students served was 14,536, requiring a budget of nearly $12 million.

In *PARC*, no census was ever undertaken either. Thus "experts can only guess how many [mentally retarded] children are presently excluded [from a free public education]."[150] One study showed that only 46,000 of the state's estimated 120,000 retarded children of school age were receiving some public education. Pursuant to the consent order of 1972, the State of Pennsylvania sought to locate and identify all such excluded youngsters. By April 1973, 15,000 retarded children were located, 7,398 of whom had been totally excluded from any educational program.[151] While the consent order's ultimate price tag is still

unclear, there is little doubt that the cost of implementation is high. In addition to locating and identifying all excluded youngsters, the state must conduct medical and psychological evaluations of those mentally retarded children it feels are unfit for regular classroom instruction and reevaluate any child excluded from regular classroom instruction every two years, as well as any time a change in his program is contemplated.[152] Also, the state must establish a hearing mechanism whereby dissatisfied parents may contest the school district's placement recommendation. The cost of providing "due process," also required by the *Mills* decision and by recent federal legislation, is discussed below.

School systems have been required by the courts to provide tuition for children for whom there is no adequate public educational program, because of the nature and degree of severity of their handicap, in order that they may attend private institutions. The costs, however, are usually quite high. A year ago, the judge in the *Mills* case found the District of Columbia officials in contempt when the school system ran out of funds for tuition at private schools.

There are other, nondollar costs that must be kept in mind as well. As noted above, placing a child in a regular classroom without providing additional services may be more detrimental to him and to the other students in the class than leaving him in a special education class. Yet without additional funds and trained personnel, this is likely to be the situation in the aftermath of a court order. On the other hand, the harm that can result from misclassification of a student by leaving him in an Educable Mentally Retarded (EMR) class is extremely serious.

Labeling: There have been several court cases concerned with the "mislabeling" of students. In both *Larry P. v. Riles*[153] in California and *Hobson v. Hansen*[154] in Washington, D.C., the plaintiff students contended that their erroneous placement in special classes for the retarded or for the slow learner was a denial of equal protection. Neither court denied the authority of the state to label children as exceptional and to segregate them according to those labels. However, since a disproportionate number of minority children were classified

and placed in the lower ability groupings or tracks, the strict standard of equal protection review could be used.

The recent Supreme Court case of *Washington v. Davis*,[155] however, may affect the extent to which the stricter standard may be relied upon to overturn the use of standardized tests to label minority children. In *Davis*, the use of a standardized aptitude test resulted in the rejection of a disproportionate number of minority applicants to the police force. The Supreme Court held that disproportionate impact alone does not make a prima facie case of impermissible discrimination and does not trigger a stricter standard of review. If *Davis* is followed in this area, either deliberate, purposeful discrimination will have to be shown, or the use of IQ or other tests must be shown to be wholly irrational for sorting children.[156]

It may be possible, under certain circumstances, to distinguish *Davis* from the misclassification cases on the grounds that the stigma of the label "retarded" tends to be permanent.[157] Moreover, if a normal child is mislabeled and put in a class for the mentally retarded or in the slow learner track, the education he will receive will be such that he will never be able to "catch up" sufficiently to transfer to the normal track. If he could show that his "education" was so "inadequate" as to fail to impart the basic skills, he might be able to argue that *Rodriguez* implies that some "minimal quantum of education" is a fundamental right and therefore constitutionally protected unless the state can show a compelling interest. In some school systems, Spanish-speaking children have been tested in English and then classified as mentally retarded.[158] Arguably, the use of such tests to classify these children is wholly irrational and hence would be invalid even under the traditional equal protection standard.

Labeling has been successfully challenged in a somewhat different context in a recent Pennsylvania case.[159] In that case, students were subjected to personality testing, purportedly to identify potential drug abusers. Both the personal nature of the questions asked during the testing and the potential for dissemination of the data acquired were held to be unconstitutional violations of privacy. The court treated privacy as a fundamental right violated by the use of

stigmatizing labels, unless the state had a compelling interest to be served by the testing.

The federal role: The federal role with regard to the handicapped is significantly enlarged by the passage of the Education for All Handicapped Children Act,[160] providing funds that are to reach the level of $3 billion by 1981--more than the federal government now spends on Title I and impact aid combined.[161] In an attempt to prevent the "overcounting" of children as handicapped, the law limits the maximum number of children to 12 percent of the total school-age population in the state. School districts, in an effort to obtain additional state funds, have been known to maintain high enrollments in classes for the mentally retarded by using certain tests that yield lower IQ scores than other tests.[162] The Education for All Handicapped Children Act thus seems to be a legislative attempt to deal with the tension between the desirability of identifying children in need of special help and the undesirability of applying to them a permanent, stigmatizing label.[163]

To ensure that the "handicapped" label is not imposed erroneously, HEW, to implement the Rehabilitation Act of 1973,[164] has proposed regulations regarding testing; these regulations include requirements that no one test or type of test be used as the sole criterion and that information from sources other than ability or IQ tests be "gathered and considered."[165] These procedures seem designed to meet the criticism that schools often define a learning deficiency solely in terms of IQ or other cognitive criteria despite the fact that the accepted practice among psychologists is to define mental deficiency in terms of both cognitive and adaptive behavior.[166] Since cognitive and adaptive skills correlate poorly among minority children, the use of measures of adaptive behavior may lessen the tendency toward overrepresentation of minority children in classes for the mentally retarded.[167] This may also create its own problems, however. Obtaining information on adaptive behavior involves personality testing and gathering data on home life; inquiry into these more personal matters may well provoke responses such as that of the *Merriken v. Cressman*[168] court which held such an inquiry to be an unconstitutional invasion of privacy.

The Education for All Handicapped Children Act also mandates stringent and costly procedural safeguards.[169] Whenever the educational agency proposes to *initiate* or *change* the identification or placement of a child, or *refuses* to take such action, written notice in the parents' own language must be provided. Parents are entitled to a hearing (upon their initiative) and it may not be conducted by an employee of the state or local education agency. Finally, at the hearing, parents are accorded:

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such a hearing, and

(4) the right to written findings of fact and decisions.

There is also the right to appeal the placement decision to the state level with the same procedural safeguards as at the initial hearing. The possible impact of these requirements can be determined from the estimates made by school authorities in Pennsylvania after the consent order in the *PARC* case, where they found they were spending approximately $500 on each hearing--about half the amount that is spent on the education of the normal or average student for the entire school year.[170]

Clearly, then, the impact of a court decision ordering those mentally and physically handicapped children who have been *totally* excluded from any public schooling to be given a public education will be substantial in both man hours and dollars expended. Without additional federal or state appropriations, the court order may cut into other priorities of the school system. But just as clearly, if the state legislatures and the educational institutions are not meeting their statutory and constitutional duties toward the handicapped, then when a specific case is presented to it, the court must afford these rights to the plaintiffs and the class they represent.

As was pointed out earlier, a number of courts (as well as the recently enacted federal legislation) give priority to "mainstreaming,"

even though not all educators and psychologists agree that this is the best approach. One purpose served by such a requirement, however, is to minimize the damage to a child who is misclassified as retarded. The serious damage--psychologically and educationally--that can and has been done through mislabeling perhaps justifies the intervention of the courts in this area--particularly in light of the discovery of large numbers of students who have been improperly classified by school systems. However, unless those children who are correctly identified as mentally retarded are provided with the necessary supporting services, "mainstreaming" may be more harmful to them than leaving them in special education classes. Perhaps it should be left to the political institutions--federal and state--to determine the educational approach, relying only on the procedural safeguards that courts have required to minimize the problem of misclassification, even though the provision of these procedural safeguards--including hearings--is costly. If it diminishes the misclassification problem and gives to both child and parents a sense that they can react to the system rather than being acted upon by it, it may be worth the cost.

Federal alternatives: What could the federal government do that it is not now doing? One approach might be to enact a law similar to the Emergency School Aid Act, which would provide federal funds to districts which, under court order or voluntarily, are attempting to meet the needs of handicapped children. Under such a law, districts could get funds and technical assistance--including counsel and special experts--to establish appropriate hearing mechanisms and to develop better systems of identifying the handicapped than, as is so often done today, resorting to the opinions of the inexpert classroom teacher.

## 4. Equal Educational Opportunity for Pupils with Varying Educational Needs

Does equality of educational opportunity mean that school districts are constitutionally required to provide "compensatory" education according to the needs of educationally disadvantaged children? Although no case has specifically held that an educationally disadvantaged child is constitutionally entitled to compensatory education,[171] this issue is implicit in a number of cases involving both the physically and mentally handicapped and the "linguistically handicapped."

Physically and mentally handicapped students: Several of the cases concerning such students go beyond the situation of the totally excluded child discussed earlier, and seek education "appropriate to the needs" of the handicapped child. It is not yet clear, however, whether handicapped children who are receiving "some" education--such as those who are "warehoused" in classes for the Educable Mentally Retarded--can argue successfully that they are constitutionally entitled to an education *more* suitable to their needs. In a recent case, residents of a New York institution for the mentally retarded alleged they had not been provided an adequate public education. The federal district court, citing *Rodriguez*, declared that:

> If there is no constitutional infirmity in a system in which the state permits children of normal mental ability to receive a varying quality of education, a state is not constitutionally required to provide the mentally retarded with a *certain level* of special education.[172]

Two multiple-handicapped brothers in Pennsylvania, with mental ages of less than two, although their chronological ages were 12 and 21, recently sought to have the school which they attended teach them how to dress, eat, and walk rather than how to read or write. The suit alleged that the plaintiffs' equal protection and due process rights were violated by school officials because they failed to offer plaintiffs training appropriate to their learning capacities, and, instead, "did no more than babysit." The court found the plaintiffs' complaint was not governed by *Rodriguez*, as in that case there had been no claim that any student received less than an "adequate" education, while here the question was whether "there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."[173] The Pennsylvania court found that the harmful consequences of denying plaintiffs an "adequate" education was greater than with ordinary children, as "mentally retarded children have greater need for formal education since they are less likely than ordinary children to learn and to develop informally." The court, referring to the *PARC* case, stated that "there may be no *rational basis* for providing education

to most children and yet denying plaintiffs instruction from which they could possibly benefit."[174]

Another case, arising in Philadelphia, and concerned with children with "specific learning disabilities" raises the same question. The plaintiffs alleged that they were "deprived of an education appropriate to their specialized needs," although they were afforded access to the same curriculum as normal children. They argued that they cannot derive *any* educational benefit from the normal curriculum without special instruction aimed at their learning handicaps. Thus they are "constructively excluded from public educational services, because--for them--the instruction offered is virtually useless, if not positively harmful." The court indicated that since *Rodriguez* "left open the possibility that the denial of a minimally adequate educational opportunity may trench upon a fundamental interest, if the state has undertaken to provide a free public education," the plaintiffs might be entitled to the strict scrutiny standard of review "because a classification has functionally excluded them from a minimally adequate education."[175]

Linguistically different students: Some education reformers have argued that the "linguistically handicapped" are in the same position as the mentally and physically handicapped children who are excluded from public schooling. A student of limited English-speaking ability receiving an education intended for the typical English-speaking pupil is being deprived of his fundamental right to a minimum quantum of education when he is compelled to sit in a classroom in which he cannot communicate. The result, in effect, is his *constructive* exclusion from the classroom and is thus a violation of the equal protection clause.[176]

When this question reached the Supreme Court in *Lau v. Nichols*,[177] however, the Court avoided the constitutional issue. Although the majority stated that teaching non-English-speaking students exclusively in English deprives them of "*any* meaningful education," the decision relied solely on § 601 of the Civil Rights Act of 1964,[178] which states that "no person . . . shall, on the ground of . . . national origin, . . . be denied the benefits of . . . any program or activity receiving federal financial assistance." The Court held that this statutory

provision and its regulations required a school district receiving federal funds to provide assistance to students with English-language deficiencies.

The plaintiffs in *Lau* represented 1,800 non-English-speaking Chinese-American students in the San Francisco school system who were required to sit in classes taught solely in English. While the majority opinion did not comment on whether § 601 would apply to a smaller number of students, Justice Blackmun emphasized that he concurred in the opinion *solely* because of the size of the affected group.[179] For this reason, the question of whether there is a *constitutional* right to have the school system affirmatively rectify the language deficiencies of non-English-speaking children may in the not-too-distant future have to be resolved by the Supreme Court. Where the line should be drawn and what the costs of compliance will be are as yet unclear.

It has also been argued that since an ethnic minority is being discriminated against by the failure to provide special assistance, the classification, like that of race, should be considered suspect, and the stricter standard of equal protection applied. It may not be necessary, however, to search for ways to trigger the strict scrutiny standard of review. If the state's goal in adopting a compulsory school law is to ensure a well-educated, informed, participating citizen, then the failure to provide *special* assistance to enable children to learn should be irrational under even the weaker equal protection standard. This argument, however, has not yet been accepted by many courts. Bilingual education frequently has become an issue in the Southwest when a court-ordered desegregation plan is being prepared. Since it arises, however, as part of the remedy in desegregation litigation,[180] there has not been a clear test, even at the lower court level, of the *constitutional* right to a bilingual education. In the remedial phase of the Denver case, the Tenth Circuit, although acknowledging that some minimal quantity of education may be a fundamental right, held that minority students are *not* "entitled under the Fourteenth Amendment to an educational experience tailored to their unique cultural and developmental needs."[181] In another case, however, there was a finding that although the educational programs provided

Anglo and Spanish-speaking students were on the surface equal, the Spanish-speaking students had lower IQ scores. The district court concluded that this evidence of unequal pupil performance indicated that the *inputs* were unequal, in that they ignored the needs and language deficiencies of the Spanish-speaking students. Thus this court looked beyond "equal" educational inputs to the outcomes and found that, since the outcomes are unequal, the educational offerings are less than equal.[182] Most courts, however, have looked only at the inputs to determine whether there has been "equal educational opportunity."

If an "inadequate" program--one which, because of limited funds, is not appropriate to the individual child's needs--is treated by the courts as unconstitutional, what will the impact be? In other words, where the physically or mentally handicapped child or the linguistically handicapped child is not totally excluded from public education, is the judiciary sufficiently equipped to determine that such children are not receiving an "adequate" education, determine what education is "appropriate to the needs" of such children, and compel school systems to provide the "appropriate" education, regardless of cost? Plaintiffs in a case brought on behalf of children with "specific learning disabilities," raised an equal protection claim which forewarns of the likely clashes between various interest groups over finite resources. They complained that school officials, as a result of the *PARC* consent decree:

> are providing mentally retarded children with a free public education especially suited to their individual needs, but are denying learning disabled children an equal educational opportunity, namely a curriculum adapted to overcome their handicaps.[183]

Similarly, parents with gifted children may clash with those of educationally disadvantaged children.

The federal role: With regard to the linguistically handicapped, Congress has responded to their perceived needs by adopting, in 1974, statutory language resembling the regulations promulgated by HEW to implement § 601:

> No State shall deny equal educational opportunity to an individual on account of his or her . . . national origin, by . . .
> (b) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[184]

This provision of the Equal Educational Opportunity Act of 1974 clearly establishes the principle that the state must affirmatively overcome the language deficiencies of non-English-speaking students. In remanding a case dealing with the charge that the failure of the school district to meet the "special needs of its Mexican-American students" is unconstitutional discrimination, the Fifth Circuit noted that while the matter of bilingual-bicultural education should probably be left to educators and not courts, the district court must nevertheless consider the matter, since "[i]t is now an unlawful educational practice to fail to take appropriate action to overcome language barriers."[185] The court cited both the Equal Educational Opportunity Act and *Lau v. Nichols*. Thus, Congress has responded to the demands of certain disadvantaged groups for affirmative action to overcome their deficiencies without the necessity of a court decision grounded in the Constitution.

The Bilingual Education Act was passed in 1968 as an amendment to the Elementary and Secondary Education Act.[186] In order to qualify for benefits under this Act, the student must be of "limited English-speaking ability."[187] Though the estimated "need" in 1975 was 5 million children,[188] federal funds reached less than 270,000 children.[189] Thus if courts continue to hold that federal statutes mandate that the states affirmatively overcome the language deficiencies of students of limited English-speaking ability, or if courts find that not to do so will violate the equal protection clause of the Constitution, the states and localities will have to bear the bulk of the fiscal burden entailed in complying with such court orders.

Federal alternatives: An additional approach that the federal government might take in the case of students of limited English-speaking ability is similar to that suggested for handicapped children. If, under § 601 of the Civil Rights Act and its implementing regulations,

children may not be handicapped in receiving an education because of their limited English-language ability, then an ESAA-type of law may be appropriate. Under the Emergency School Aid Act, bilingual education assistance is now available for an area undergoing desegregation, but funds and technical assistance are also needed for *any* area impacted by non-English speaking students. Since the current estimate is that federal funds under the Bilingual Education Act reach less than 5.4 percent of the total "need," states and localities now must bear the bulk of the burden of complying with § 601's requirements.

5. The Right to a Minimum Level of Education

Another category of students functionally denied a suitable education is illustrated by *Peter Doe v. San Francisco Unified School District.*[190] Peter, who graduated from high school after having been enrolled in the district's schools for 12 years, brought an "educational malpractice" suit against the school district for "negligently and carelessly": (1) failing to notice his reading disabilities, (2) assigning him to classes in which he could not read the books, (3) promoting him to a higher grade knowing that he had not achieved the skills in the previous grade necessary to benefit from the more advanced classes, (4) assigning him to classes with unqualified instructors, and (5) allowing him to graduate from high school although he was unable to read at the eighth grade level as required by the California Education Code for graduation.[191] Tests showed Peter to be of average intelligence, his attendance record was average, and he was never a disciplinary problem. Although teachers and administrators assured his mother that he was achieving at his grade level, his skills in reading, writing, and computation, when he graduated from high school were only at the fifth grade level. He sought damages for lost wages due to his restricted occupational opportunities and additional compensation for the cost of private tutoring.

The court held that, in view of what it called "public policy considerations," the school district as a matter of law does not owe the plaintiff a "duty of care" such that it would be liable for its breach.

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury . . . . The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[192]

There is no perceivable "connection between the defendant's conduct and the injury suffered . . . ."[193] The court further noted that in view of the current feeling of public dissatisfaction with the schools,

> [t]o hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers . . . . The ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation.[194]

Doe is appealing the case to the California Supreme Court. If the suit is ultimately successful in obtaining a ruling that a school system is legally accountable for the adequacy of the education a student gets--that is, for the output rather than the inputs--it could have a significant, but mixed impact on educational institutions. While it might deter "teacher-caused educational deficiencies,"[195] a successful educational malpractice suit might also deter people from teaching altogether, discourage innovative and experimental ways of teaching disadvantaged children, and, as the *Doe* court points out, reduce funds available for the classroom.

Related to the issue of the negligence of schools in failing to teach the basic skills is the demand for minimal competency legislation requiring that the student demonstrate his competency in certain basic skills in order to be promoted from one grade to the next or to graduate from high school.[196] In some states, children who fail the proficiency tests are provided with remedial instruction in the hope that they will be able to pass the test by the time they reach the

twelfth grade.[197] Care will have to be taken that this does not reintroduce the tracking system previously held unconstitutional by several courts,[198] since most of the students in the remedial track would likely be minority, linguistically handicapped, or poor. Additional money will have to be spent for the remedial classes in which failing students are placed; estimates are that 25 or 30 percent of the students may not be able to pass the test or at least will have to take it several times.[199] The costs of educating those who are unable to pass the test and must therefore remain behind in these remedial classes and the impact on a student's future education or job opportunities if he is denied a high school diploma have yet to be calculated.

6. Equal Educational Opportunity and Race

a. The student's right to a desegregated education. School desegregation was the first major area of education in which the courts became actively involved, beginning with *Brown v. Board of Education*.[200] That involvement continues today in what has become an ever more complex situation, with the primary focus on what are appropriate remedies and what are their limits. The Supreme Court has declared that the objective of all school desegregation remedies is "to eliminate from the public schools all vestiges of state-imposed segregation."[201] To achieve this objective, an "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." Thus, "the very limited use . . . of mathematical ratios [is] within the equitable remedial discretion of the District Court."[202] Nevertheless, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[203] The pairing or clustering of schools, the altering of attendance zones, and majority-minority transfer plans are permissible remedial tools.[204] Busing is also a permissible tool to achieve the objective of eliminating "state-imposed segregation," but it is limited by time and distance constraints (these vary according to the age of the students involved).[205] While the Supreme Court has not addressed the question directly, circuit courts relying on some statements in

recent Supreme Court opinions have generally held that the possibility of substantial "white flight" *cannot* be a consideration in formulating a remedy.[206] A metropolitan-wide or interdistrict remedy can be implemented only where it can be shown that segregation in one school district *resulted from* discriminatory actions by officials in other school districts or by state officials.[207] Finally, once a school district has established a racially neutral system of student assignment, it need not annually readjust the attendance zones when the "normal pattern of human migration" results in changes in the racial makeup of some of the schools.[208]

The issues resulting from the "second generation problems" in desegregation cases are more difficult because they are both more subtle and more complex. Through various practices such as ability grouping and the selective use of disciplinary measures, minority children may continue to be denied equal educational opportunity even though the school system has been "desegregated." The courts, therefore, have held that when a formerly dual, segregated school system is in the process of being dismantled, pupil assignment by standardized achievement or IQ test scores is unconstitutional where the intended result is the perpetuation of the dual system.[209]

Where it is not clear that ability grouping is racially motivated or has a racially discriminatory effect,[210] it would seem to be constitutionally permissible to utilize such a practice. The unresolved controversy over whether heterogeneous or homogeneous grouping is the better educational practice[211] makes it difficult for courts to adjudicate issues surrounding the use of these practices except where the racial motivation is blatant or where the practices are suspect by first being implemented at the time of a desegregation suit. One court has found that the *tests* used to place children in tracks or ability groups were biased against minorities and therefore abolished the system of tracking.[212] A difficulty with this is that once the tests are eliminated, the school system has nothing to fall back on to evaluate pupil performance, a particularly intractable difficulty because there is some doubt as to whether "culture-free" tests can be developed.[213] And once the tracking system is eliminated by the court, what alternative

means does the school system have to meet the special needs of a diverse group of children with a wide range of learning abilities, cultures, and backgrounds?

Suspensions, expulsions, and other disciplinary measures can also bring about the resegregation of schools.[214] One recent survey has shown that black students are suspended three times as often as whites in elementary school and twice as often in secondary school.[215] In a period of one year, the Dallas school system suspended more than 6,000 minority students, nearly ten percent of the black school population.[216] These practices have been attacked in the courts with only limited success. In one case, where a disproportionate number of black students was suspended after a black-white confrontation, the court accepted the arguments of school officials that only the black students were easily subject to identification and apprehension. Because there was sufficient evidence to justify and support the disciplinary actions taken against each *individual* black student, the court refused to examine the allegation that there was a *pattern* of racial discrimination.[217]

Only one decision has upheld the plaintiff minority students' claim that systematic suspensions and expulsions of black students violated the equal protection clause. In Dallas, Texas, a class action was brought contesting the school district's suspension policy. A distinguishing feature of the plaintiffs' complaint is that it focused on districtwide statistics for an entire year rather than upon figures relating to a single incident. In addition, the school superintendent acknowledged in court that institutional racism was the cause of the disproportionate impact on minorities of the suspension policy. The relief afforded by the court, however, did not restrict the use of suspensions; rather, the school system was directed to institute a program aimed at lessening racism.[218] However, the due process requirements for the imposition of such sanctions as suspensions and expulsions, articulated recently by the Court in *Goss v. Lopez*,[219] may slow down the use of such practices on disproportionate numbers of minority students.

Costs: The impact that court-ordered desegregation has on a local school district is well known by now. In addition to busing costs, there are costs attributable to teacher retraining, curriculum development, and building remodeling necessitated by the pairing of schools. The State of

Michigan sought to delay implementation of the Sixth Circuit order to expand desegregation in Detroit because the state was unable to pay the $5.8 million the court had required it to pay to the Detroit school system. This money, it was argued, would have to come out of the funds appropriated for other departments of the state or would require the state to assume an unconstitutional deficit. The Sixth Circuit, however, upheld the requirement.[220] Federal funds are too restricted, both in terms of the timing and the nature of the expenditures, to provide much assistance to states and localities. Expenditures necessitated by the desegregation process no doubt constitute the largest diversion of funds which would otherwise have been budgeted for different school purposes. This is not to say that these dollars would otherwise have been spent for better education; the process of desegregation, it has been shown, can bring about significant educational reforms for the entire system which otherwise would not have occurred.[221] Perhaps the greatest impact, however, results from the policy-managing role that the courts have played in school desegregation cases. The image many state and local officials, as well as the citizenry, have is of the judge in such a case poring over alternative bus routes, deciding which teacher is to be transferred across town, or requiring resources to be taken from School A and given to School B--in other words, making the kinds of decisions ordinarily made by the school board or the superintendent. But it should be noted that a principal characteristic of the affirmative relief of a desegregation decree is that the parties have some control over the outcome. In many cases, the court's order that follows a determination that there has been a constitutional violation is based on desegregation plans submitted by the school board and the plaintiffs. Sometimes these plans are submitted to a special master appointed by the court who reviews the plans and makes findings and recommendations. Thus, in many cases, the judge is not acting along, "ultra vires." It is true that when the litigants are unable to agree on an acceptable solution, the court must step in and fashion a remedy of some sort; even here, the court attempts to balance various interests including those of groups not represented by the litigants. And here, too, special masters or experts are often relied upon.[222]

The federal role: There are several federal programs which have an impact on the desegregation process, not all of them favorably. One commentator has pointed out that even those federal programs that are designed to *aid* desegregation, such as the Emergency School Aid Act,[223] are targeted on the wrong part of the process.[224] The time for such assistance is *after* the immediate transition period when everything is in flux. The real process of planning, curriculum development, and the restructuring of classroom operations, however, often is just beginning when federal funds are withdrawn.

Much of the litigation over the Emergency School Aid Act has concerned HEW's denial of federal funds to local educational agencies.[225] Generally, courts have upheld the HEW denials as within HEW's discretion.[226] Other litation has focused on the demands by city officials to be allowed to use ESAA funds for court-ordered busing. A suit brought by city officials in Nashville sought to compel federal officials to grant the city funds under ESAA for court-ordered busing.[227] HEW's policy was to decline to award funds for such purposes. The court, however, found that busing was "an authorized and contemplated activity" under the ESAA, basing its conclusion on an examination of the legislative history of the Act.[228] The actions of HEW officials were therefore held to be illegal, "as in excess of powers granted to them by the applicable statutes" and "because they actually violated the purpose and intent of the Congressional enactments." Moreover, in enforcing the "blanket prohibition against federal funding for school transportation," the officials also violated the Fifth Amendment's procedural due process guarantees, since in effect, they were "thwarting" the implementation of a court order to the school district to desegregate. However, this suit and others like it were litigated prior to the passage of statutes which sharply restrict the use of *any* federal funds for busing.[229]

Apart from the enactment of the Emergency School Aid Act, the predominant federal response to the constitutional requirement of desegregation has been negative--enacting legislation designed specifically to impede or undercut the process. Representative of the first type of legislative response are the anti-busing laws.[230] The legislative prohibition on the use of federal funds for busing has been upheld by the courts. When a court order to institute a desegregation plan in

Jefferson County, Ky., was issued, state officials sought to have the court declare that they were not responsible "for that portion of the increased cost of operating the Jefferson County public school system which would be attributed to additional busing of students required by the desegregation order."[231] They asserted that the statutes prohibiting the use of federal funds for transportation to carry out a school desegregation plan[232] were an unconstitutional interference with the enforcement of the court's desegregation order. The court held, however, that "[t]he burden of paying the cost of transporting [the] students remains on those responsible for the creation of the unconstitutional school system, the local school district and the state,"[233] and thus the federal statutes were not in conflict. Furthermore, the court found that of all existing federal education programs, only one conceivably could be used for transporting students under a desegregation order--the Emergency School Aid Act--but these funds were to be used solely for specialized programs which a local district could not normally provide. Thus even if there were no statutory prohibition of such expenditures, the court concluded, federal funds could not have been used for transportation.

The requirement in Title I of the Elementary and Secondary Education Act that there be a concentration of Title I-eligible students before compensatory education funds will be allocated to a school (or schools) undercuts the dispersal in urban areas of low-income students--who are predominantly minority.[234] Several other measures which failed to pass--such as the Quality School Assistance Act--were designed to concentrate resources in the cities with large low-income populations; this would have had a similar effect on efforts to disperse the minority student population from core urban areas.

Federal alternative: In no way can the courts be expected to retreat from their position on school segregation. The Supreme Court's command that school districts desegregate *now* must be taken as a given. To date, the political branches of the federal government--both the executive and the legislative--have isolated the courts and left them unsupported in their efforts to enforce the Constitution, as illustrated by the Congressionally imposed restrictions on the use of ESAA or other federal funds for court-ordered busing. These branches should

begin to focus on what is the most effective way to make school desegregation work and on developing institutions or mechanisms that can suppcrt or supplement the involvement of courts in school-desegregation plans. Courts too might consider whether there are areas of educational policy that are inappropriate for judicial intervention. One such area might be ability grouping, with the judiciary adopting a hands-off policy unless the ability grouping is shown to be racially motivated. Discipline may be another such area, as long as the requisite procedural safeguards are provided.

b. Equal employment opportunity for teachers. The affirmative constitutional duty of school authorities to desegregate a dual school system includes the requirement to reassign faculty and staff so that no school can be identified as one for a particular race.[235] After the initial reassigning of faculty so that the racial composition of the faculty at every school reflects the systemwide distribution, the hiring, firing, and assignment of staff must be on a nondiscriminatory basis.[236] Collective bargaining agreements that impede the achievement of faculty desegregation are invalid; tenure cannot be used as a justification for failing to initiate and maintain desegregation of faculties.[237] These procedures are required to implement the constitutional rights of *students*. In addition to the student's right to a desegregated education are the rights of individual teachers who claim to have been denied access to a job or to promotion on the basis of race.

The *Singleton* principles for the desegregation of faculty, articulated by the Fifth Circuit in 1969,[238] continue to be applied by the courts. *Singleton* requires that when a school district is under court-ordered desegregation and there is an anticipated reduction in faculty resulting from the implementation of the order to disestablish the dual school system and create a unitary system, objective criteria must be developed to evaluate teachers who might be dismissed or demoted. In the absence of these objective, nondiscriminatory criteria, teachers may not be discharged even for professional incompetence.

A recent Texas case is illustrative of how *Singleton* is applied.[239] Although the school district contended that the plaintiffs, two black teachers, had been dismissed for incompetence, the court found that no objective criteria had been established for evaluating and dismissing

teachers. This, combined with the fact that the teachers were discharged within a few months of having been transferred to a formerly white school, led the court to find that racial discrimination entered into the decision to dismiss them. By contrast, in another school district, when 17 out of 23 black teachers were terminated, all of the white teachers retained, and new white teachers hired following the creation of a unitary school system, the court held that the school district was not obligated to comply with *Singleton*.[240] Since the district had never been under court order, but had desegregated voluntarily, the nontenured teachers, rather than the district, had the burden of proving that they were dismissed for constitutionally impermissible reasons. Thus the courts require the use of "objective evaluative" criteria only if the reductions in staff are related to desegregation resulting from a court order. Claims of discrimination in public school employment on the basis of race are not based solely on the Constitution's equal protection clause, but are often brought under Title VII of the Civil Rights Act of 1964--extended to cover school employees in 1972.[241]

c. Certification and credentialling of teachers. The use by school authorities of test scores as the basis for certifying teachers or for hiring or promoting one teacher or administrator in preference to another has been challenged on the ground that it has a disproportionate effect on minorities and denies them access to employment in the system. Both the Graduate Record Examination (GRE) and the National Teachers' Examination (NTE) have been so used, despite the fact that the Educational Testing Service (ETS), which developed these tests, has said that the tests are not appropriate for measuring qualification to teach or the level of teacher competency.

Intentional discrimination: In several cases, courts have found the use of cutoff scores on such tests to be *intentional*, invidious racial discrimination. In one such case, the school authorities required that all new applicants score 1,000 or above on the NTE. The court found that the *purpose* of the cutoff score was to bar proportionately more black teachers than whites.[242] Thus, the use of the NTE cutoff score was subject to the strict scrutiny of the court, shifting the burden to the defendant school district to meet the equal

protection attack by demonstrating an overriding purpose in its use of the cutoff score independent of any racial effects. The court stated that a "school district's desire to improve its faculty may be such an overriding purpose, provided the policies and procedures employed to implement this goal are clearly related to it."[243] Here, however, the court found that the 1,000 cutoff score was an arbitrary and unreasonable qualification for employment, purposely devised to discriminate against blacks, and thus its use violated the equal protection clause.

Discriminatory effect: There are cases where *no* intentional discrimination is found but where the use of test scores has the *effect* of discriminating against minority applicants for certification or promotion. In view of the lower number of minority applicants successfully completing a written test required by the New York City Board of Education for advancement to the positions of vice principal or principal and the small number of minority principals in New York compared with other similarly situated cities, the test was held to have a discriminatory effect.[244] The burden of proof was then shifted to the city. The Second Circuit found that the testing process was invalid since there was not a close relationship between much of what was asked on the test and the skills required for the job, and that the results measured nothing more than the ability to take this kind of test.

In a similar case, a three-judge district court found that the use by the State of North Carolina of the 950 NTE cutoff score had a disproportionate racial impact.[245] The court determined that the state had a legitimate interest in maintaining certain standards for the teaching profession, and did not even rule out the possibility of a written examination with a cutoff score to identify qualified teacher applicants,

> provided that such cut-off score shall first have been validated with respect to minimum academic knowledge an applicant must possess in order to become a reasonably adequate and competent teacher and that such score be shown to bear a rational relationship to teaching capacity.[246]

A number of other courts have reached the same result regarding the use of the National Teachers' Examination for deciding whether teachers are to be retained or promoted.[247]

In all of these cases involving disproportionate impact without proof of discriminatory purpose, the equal protection clause of the Fourteenth Amendment was relied upon inasmuch as the challenged actions took place before Title VII was amended to include state and local government employees.[248] Were those cases brought today under the equal protection clause, plaintiffs would probably not prevail in view of the recent Supreme Court decision in *Washington v. Davis*.[249] In that case, the Supreme Court reversed the appellate court's holding that the use of a written personnel test which excluded a disproportionately high number of black applicants for the police force was unconstitutional. The Supreme Court held that disproportionate impact *alone*, without any indication of discriminatory purpose or intent, does not make the use of the test a violation of the Constitution. Proof of discriminatory *purpose* is necessary. The Supreme Court, in the course of the *Davis* opinion, noted that cases such as *Chance v. Board of Examiners*, the Second Circuit case discussed above, were improperly decided.[250] On the other hand, future cases *can* be brought under Title VII and will be subject to the stricter standards. According to the Supreme Court, even though discriminatory purpose must be proved to establish a constitutional violation, Congress has provided that discriminatory purpose need *not* be proved in determining whether hiring and promotion practices which disqualify a disproportionate number of blacks violate Title VII.[251]

Federal role: Federal statutes by and large cover the area of discrimination in employment on the basis of race. In the case of teacher certification and evaluation, if the criteria used have a disproportionate racial impact, then Title VII of the Civil Rights Act of 1964 demands that, before they can be used, the criteria be shown to be related to the job in some way. If for some reason Title VII does not cover the employees in question and a challenge to the tests must be based on the equal protection clause of the Fourteenth Amendment, then *Washington v. Davis* requires that *purpose* or *intent* to discriminate, as well as racially discriminatory effect, must be shown.[252]

7. Equal Educational Opportunity and Sex

The constitutional issues with regard to sex discrimination are much less settled than are those connected with race. In determining whether sex-based legislation violates the equal protection clause of the Fourteenth Amendment, the Supreme Court has been divided as to the standard to be applied. A majority of the Court does seem to think that a minimum rationality test is no longer appropriate, but while sex discrimination has been elevated to a higher level of constitutional protection than most other forms of discrimination, the Court has not treated sex as race--that is, as a suspect class triggering the strict scrutiny standard of review.[253] The federal government, with the passage of Title IX of the Education Amendments of 1972, has indicated its concern with the differential treatment of students based solely on sex.[253] Title IX also extends to sex-based discrimination in public-school employment,[255] as does the Equal Pay Act[256] and Title VII of the Civil Rights Act of 1964.[257]

a. The student's right to an education without discrimination based on sex.

Admission to special schools: Academically elite public high schools exist in a number of school districts and have often discriminated on the basis of sex--either by total exclusion of students of one sex or by requiring higher entrance requirements for women applicants. The Third Circuit recently held that neither the Equal Educational Opportunities Act[258] nor the Fourteenth Amendment to the Constitution prohibited the exclusion of a female student, solely on the basis of sex, from an all-male college-preparatory public high school where there was an all-female academic high school of comparable quality which the plaintiff could have attended.[259] The dissenting judge termed this a return to the "separate but equal" doctrine, but the majority pointed out that only where women have been *deprived* of benefits rather than being offered them on the same basis as the opposite sex has the Supreme Court held laws which discriminate on the basis of sex unconstitutional. "If she [the plaintiff] were to prevail, . . . those students and parents who prefer an education in a public, single-sex school would be denied their freedom of choice."[260] At the time of

this writing, the case has been argued before the Supreme Court but no decision has been handed down.[261] Title IX would not have been of any greater help than the Constitution to the plaintiff in obtaining admission to an all-male school, as long as there is another school with comparable courses, services, and facilities available to her.[262]

Whereas challenges to separate (but equal) facilities with identical admissions standards are likely to be unsuccessful under either the Constitution or Title IX, both are more likely to support challenges by female plaintiffs where academically elite or other specialized schools require higher admissions standards for female applicants than for males. The Ninth Circuit, using a "strict rationality" test, held the differential admissions standards of an elite academic high school in San Francisco to be an unconstitutional violation of the equal protection clause.[263] Title IX regulations also prohibit the use of such differential admissions criteria: a student may not be excluded on the basis of sex from admission to a school unless comparable courses, services, and facilities are otherwise made available "pursuant to the same policies and criteria of admissions."[264]

Access to courses: With regard to access to certain vocational and industrial arts or other similar courses segregated on the basis of sex, barred to one sex, or required of only one sex, nearly all the cases that have challenged such policies on constitutional grounds have been dropped or settled out of court.[265] For the future, most challengers of segregated classes will probably rely on the Title IX regulations rather than the Constitution. Title IX regulations prohibit sex-separated health, industrial, business, vocational-technical, home economics, and music courses, and prohibit sex-based differential course requirements for graduation (e.g., home economics for girls and industrial arts for boys).[266] Separate physical education classes are prohibited, although students may be grouped by ability, if the grouping is based on an assessment of individual skills and not on the sex of the student.[267] Discrimination on the basis of sex in the counseling or guidance of students is also outlawed by Title IX.[268]

Pregnancy: School districts frequently suspend or expel pregnant students or unwed mothers. The federal courts, however, generally prohibit such actions without a showing that the presence of the particular

plaintiff will present a danger to her physical or mental health or will have an adverse effect on the education of her classmates.[269] Rules which completely exclude pregnant students or unwed mothers from the public schools can probably be challenged successfully under the equal protection clause. The *Rodriguez* decision should not be a bar, since such exclusion absolutely deprives a child of education and thus the strict scrutiny standard of equal protection would apply. It might even be argued that if deterring adolescent sex is the goal, punishing only the pregnant student and not all students who engage in extramarital sex is an *irrational* means of accomplishing that goal. One court, however, has relied on *Rodriguez* to uphold school board policy denying readmission of a fifteen-year-old unwed mother to high school since she could complete her education by attending night school.[270] Title IX regulations, which prohibit the exclusion of pregnant students or students who are parents from *any* education program or activity unless the student *chooses* to participate in a separate portion of the program or activity, clearly would cover this situation today.[271]

Federal role: As is by now abundantly clear from the preceding pages, Title IX regulations all but blanket the area of sex discrimination in the schools. Thus, the pressures for equality on the basis of sex, which had barely begun in the courts, quickly shifted to Congress. Federal enforcement mechanisms, however, are either weak or so draconian that they are not likely to be frequently used. School systems which are not in compliance can have their current funds revoked or they can be barred from eligibility for future awards.[272] In addition, HEW may refer a case to the Department of Justice with a recommendation that appropriate proceedings be brought.[273] It should be noted, however, that the Seventh Circuit has recently held that while Title IX is designed to encourage voluntary compliance with the ban against sex discrimination and provides for an *administrative* hearing, Congress did not envision "the rather drastic remedy of individual lawsuits."[274] Thus the law created no right of private, individual action when a student has been denied admission to a school or a course solely on the basis of gender. Title IV of the Civil Rights Act of 1964, which permits the Attorney General to initiate proceedings at the request of private complainants, was amended to add the word "sex" so that the Attorney General may challenge sex

discrimination in public schools, colleges, and universities on equal protection grounds at the request of a private complainant.[275]

The sanctions provided in Title IX--termination of or refusal to grant assistance--are expressly limited by the Act to the particular entity that fails to comply with the Act, and further, to the particular *program* or *activity* in which the discrimination occurs.[276] Title VI has an analogous restriction, but in the majority of cases involving elementary and secondary schools, this has not caused any great difficulty since racial discrimination has tended to be systemwide.[277] By contrast, sex discrimination is often limited to particular educational programs or activities--such as athletics--which may receive no federal funds even though the school system as a whole is receiving federal assistance under various federal acts. Title IX, however, has been construed broadly by the Department of Health, Education, and Welfare to reach any areas of sex discrimination in educational institutions receiving federal assistance, even though the particular program or activity in question receives no federal aid directly.[278] It is clear that if HEW is correct in its position that Title IX reaches athletics, it must be able to cut off funds earmarked for purposes other than athletics in order to enforce its regulations. This may mean, for example, that HEW could terminate Title I funds or funds under the Education for All Handicapped Children Act upon a showing of discrimination on the basis of sex in the athletic program.

Costs: Many of the constitutional challenges to sex-based discrimination have been brought on behalf of an individual student. Often the result is a finding that the school rule or regulation as applied to the plaintiff is invalid, rather than a finding that the rule or regulation itself is invalid. This has occurred most frequently in the case of challenges to the exclusion of female students from participation in certain athletic activities or from certain vocational courses. The response of the school system to the pending litigation has been to admit that one student. Thus the principal costs have been incurred by the school district in defending the lawsuit, not in implementing new programs. This is not likely to be true any longer, however, because of the impact of Title IX, which requires affirmative action on the part of school systems. Complying with the regulations should significantly alter many of the educational programs

now offered in the public schools, and this will have a substantial budgetary impact. The amount of money now spent on athletic programs for male students far exceeds that typically allocated to women's athletics. While the regulations do not require equal expenditures for males and females, among the factors examined to determine whether equal opportunities are available are the provision of equipment and supplies, travel allowances, and facilities.[279] The cost of upgrading these areas for women is bound to be high. Similarly, the amount of money allocated to formerly male-only vocational courses (because of lower pupil-teacher ratios and the use of expensive equipment) frequently exceeds that spent on those courses which teach secretarial and homemaking skills to female students. Again, the expenditure of substantial sums--or the elimination of a number of courses--will necessarily be required. At present, the federal government does not provide financial assistance to school districts struggling with compliance.

b. Equal employment opportunity for teachers

In 1974, the Supreme Court, in *LaFleur*, held that a school board policy requiring pregnant teachers to take mandatory leaves far in advance of their expected delivery dates violated the due process clause of the Fourteenth Amendment.[280] The cutoff dates had no valid relationship to a legitimate state interest but rather created an irrebuttable presumption that every teacher who reached the date was physically incapable of continuing her duties.

Title VII of the Civil Rights Act and the Equal Employment Opportunity Commission (EEOC) guidelines[281] promulgated pursuant to that Act have also been the basis for overturning mandatory maternity-leave rules and policies that exclude pregnancy-related disabilities from the school district's disability-benefits coverage. Lower courts have generally struck down mandatory-leave policies as being in violation of Title VII.[282] Some courts have found such policies in violation *only* of the statute and not of the equal protection clause of the Fourteenth Amendment.[283] The great majority of cases in this area, however, are litigated today under Title VII.

The denial of sick-leave benefits to employees absent due to pregnancy was held by the Ninth Circuit *not* to violate the equal protection clause of the Fourteenth Amendment, since the decision was based solely on economic factors and there was no indication that the school board's policy was a pretext to discriminate invidiously against the plaintiff. On the other hand, the same court held that the denial of sick-leave pay during pregnancy leave did violate Title VII of the Civil Rights Act.[284] In *Geduldig v. Aiello*,[285] the Supreme Court had held that a California disability insurance scheme which excluded pregnancy disability as a compensable injury or illness did not invidiously discriminate in violation of the equal protection clause. The Ninth Circuit, therefore, relied on *Geduldig* to uphold the constitutionality of the policy, but found that *Geduldig* was not relevant to Title VII since the Civil Rights Act prohibits classifications which "'*in any way* [sic] would deprive *or tend to deprive* any individual of employment opportunities or *otherwise adversely affect* [her] status . . . .'"[286] The Supreme Court, however, relying on the same reasoning as that employed in *Geduldig*,[287] has just held that a disability plan which excludes pregnancy does *not* constitute a violation of Title VII.

## B. PROTECTION OF INDIVIDUAL RIGHTS OF STUDENTS AND TEACHERS

Since *Tinker v. Des Moines Independent Community School District* and *Pickering v. Board of Education*,[288] the courts have attempted to strike a balance between the freedom of the individual--whether teacher or student--and the necessity for order and stability in the educational enterprise. In some respects, the legal rights of teachers are indistinguishable from those of students. Certainly the teacher is neither more nor less able than students to disrupt the educational process or challenge the rules and regulations governing personal appearance, speech, and association[289] made by school administrators. The close relationship between the nature of the teacher's job and "academic freedom," however, affects the judicial approach to constraints on the teacher's conduct and speech in different ways than is the case with students. And while children are not yet accorded the full panoply of constitutional rights,[290] teachers are adults and entitled to the same constitutional rights as other adults, subject to

whatever constraints are dictated by the special nature of public educational institutions.[291] In some respects, however, the teacher's rights are *more* restricted than the student's because of certain distinctions between student and teacher: the student is required by compulsory attendance laws to attend school; the teacher is there voluntarily and is free to seek employment elsewhere. Also, since teachers are viewed as role models for student behavior, they have been dismissed for their out-of-school as well as their in-school activities.

The results of judicial activity in this area have had little direct impact on federal policies, but the constraints that may be imposed on the educational enterprise with respect to its students and employees may produce an indirect effect of which federal educational policymakers ought to be informed.

1. Right of Privacy and Related Rights

The Supreme Court has held that "a right of personal privacy, or a guarantee of certain areas or zones of privacy"[292] is constitutionally protected. A significant proportion of the "privacy" cases have been concerned with that aspect of privacy relating to personal autonomy. This right has been raised in some of the cases challenging hair and dress regulations. Another important aspect of privacy is that which concerns the right not to have personal information about oneself disclosed to others. There are only a few cases, however, holding that this aspect of privacy is protected.[293] Thus it is *Congress* rather than the courts that have stressed the need for protection from the government's intrusive acquisition of information or from the dissemination to others of personally identifiable information.[294]

a. Access to student records

The question of who has access to a student's permanent file (e.g., other teachers, potential employers, the F.B.I.) and the question of what can go into the file (e.g., disciplinary records, psychiatric reports, IQ scores, unverified and unchallenged reports that the student is a "troublemaker" or "disrespectful") have been the subject of much discussion, but there are few court cases. A few states, by law

or school board regulation, allow parents and students access to the full school record.[295] Some courts have upheld the right of parents and students to inspect the student's records, at least in the absence of a contrary state regulation or statute.[296] More often, however, students and parents have been denied access to the student's own records, even though others outside the school system have been allowed to see them. Preventing access by others to confidential data is as big a problem as gaining access to one's own record, although there are a few states which prohibit the release of information without prior authorization by either the student or a court order.[297]

Federal role: In 1974, the Family Educational Rights and Privacy Act (commonly known as the "Buckley Amendment")[298] was enacted, establishing comprehensive guidelines to ensure students (and their parents) access to their school records[299] and prevent invasions into family and student privacy occasioned by the release of school records to third persons without prior student or parental consent. The Buckley Amendment provides that federal funds are either to be terminated or refused to any educational agency which violates its provisions. Included among the exceptions to the prohibition against providing access to student records without the parent's or student's written consent are the Secretary of HEW and state educational authorities who need the data for auditing and evaluating federally supported education programs or enforcing the legal requirements of such programs.[300] However, unless otherwise authorized by federal law, all data are to be collected in such a manner as to prevent the personal identification of students and their parents by other than those officials, and such personally identifiable data are to be destroyed when no longer needed.[301]

There has been little judicial activity in this area. State legislatures have been more active--over 25 states have laws or regulations governing access to student records. Only four states, however, permit parents or students to challenge material in the record.[302] The Buckley Amendment and not judicial decisions will substantially change the policies of a significant number of states.

b. Search of students and their lockers

A major controversy surrounds the question of whether a student is constitutionally protected against searches of his person or property. The issue has come up with increasing frequency as violence and the use of drugs on school grounds has increased. The Fourth Amendment prohibits "unreasonable" searches and seizures conducted by governmental agencies. Since the Supreme Court has recognized that, under the Constitution, students in as well as out of school are "persons" who possess certain constitutional rights which the state must respect,[303] government officials, including police officers, are governed by the Fourth Amendment in their treatment of students both on and off school property. Thus, any evidence obtained by the police through an unreasonable (and therefore unconstitutional) search and seizure of a student on or off school grounds is inadmissible in a state or federal criminal prosecution. Whether or not such evidence is also excludable from school disciplinary proceedings is an open question.

Search by police officers on school grounds: With regard to police searches of students' lockers, courts in a substantial number of jurisdictions have held that the lockers belong to students and school officials jointly.[304] Since each student is assigned a locker subject to regulations governing its use and title to all lockers remains with the Board of Education, school officials may grant consent to a police search of a student's locker, and such consent is binding on the student. The question of whether evidence that has been obtained in violation of the Fourth Amendment--that is, evidence resulting from unlawful searches and seizures--can be excluded from school disciplinary proceedings was resolved by one court in the negative: a school board, in disciplinary proceedings, may *not* consider evidence obtained in violation of Fourth Amendment rights.[305] This case, however, only involved evidence illegally obtained by police officers *off* school property. It is not clear whether evidence obtained illegally on school property would also be barred from school disciplinary proceedings.

Search by school officials: Another question is whether the Fourth Amendment applies to searches and seizures by school officials. Some courts have held that school officials are not government officials

like the police; rather, in an absurd extension of the *in loco parentis* doctrine, parental authority over a student is said to be delegated to school administrators and teachers, and they are therefore subject, when disciplining students, only to the same standard of reasonableness which applies to parents in disciplining their children.[306] Thus, in many jurisdictions, school officials are permitted to search and submit the fruits of such search as evidence in delinquency and criminal proceedings.[307] In one case, when a high school principal, demanding that a student empty his pockets, discovered him to be in possession of marijuana, he turned the student over to the police. This action was upheld by the state court on the ground that school officials were exempt from the restraints of the Fourth Amendment under the *in loco parentis* doctrine. The dissenting judge, however, pointed out that had the student's parents conducted the search instead of the principal, they would not have been obligated to call in the police upon finding the marijuana.[308]

Some jurisdictions have held that school officials are subject to Fourth Amendment restraints,[309] and that the *in loco parentis* authority of school officials cannot transcend constitutional rights.[310] Even in some of these jurisdictions, however, there is a reluctance to subject school officials to the same Fourth Amendment standards as law enforcement officers. One court held that there must be a balancing between the student's Fourth Amendment rights and the application of the *in loco parentis* doctrine. That is, the Fourth Amendment applies only after taking into account other societal interests.[311]

The Georgia Supreme Court has recently held that the restraints by the Fourth Amendment on schoolhouse searches by school officials are minimal so long as the school officials are acting in their proper capacity and law enforcement personnel are not involved in the search.[312] The court dealt with the personal search issue in a novel way, holding that the exclusionary rule does not apply to evidence illegally seized by school officials, reasoning that the exclusionary rule is not coextensive with the Fourth Amendment, but is applicable only to action taken by *law enforcement personnel*.

In sum, there is not much law to protect a student against searches of his person or property, although in some jurisdictions, if the student

clearly does not consent to the search, there is a possibility that any evidence found will be barred from use in court and even in school disciplinary proceedings. The Supreme Court has not yet clarified whether or not the Fourth Amendment applies to students while they are on the school premises.

c. Right of privacy

A somewhat different aspect of the right of privacy was raised in a suit seeking to enjoin school officials from implementing a program designed to identify potential drug abusers among the junior high school population in a Pennsylvania school district.[313] The program sought through subjective and highly personal questionnaires to identify those students who possessed personality traits similar to those of actual drug abusers, by inquiring into family religion, race, whether one or both parents "hugged me good night when I was small," "tell me how much they love me," "make me feel unloved."[314]

The plaintiffs contended that the program was an invasion of their constitutionally protected right of privacy. The court, while noting that a student's right to assert his constitutional right of privacy is not in any way invalidated by his being a juvenile, treated the right of privacy solely within the context of family relationships and child rearing.[315] Consequently, it is not entirely clear whether the Constitution protects the privacy rights of the parent, of the student as a member of the family, or of the family as a unit.[316] The court enjoined the school officials from administering the program, on the ground that there was not the informed *parental* consent that would be needed to waive constitutional rights, and that in the absence of such consent, the public interest in coping with the problem of youthful drug abusers was outweighed by the individual's right of privacy in the family setting.[317] The decision thus leaves unclear to what extent the student's own right of privacy is constitutionally protected and whether parents may waive their children's constitutional rights.

Schools are administering to students a rapidly increasing number of tests--including psychological tests and assessments and evaluations--with questions eliciting data to determine the socioeconomic status of students. A potential conflict exists between the need for such data

to improve or evaluate the effectiveness of educational programs or permit a focus on the noncognitive aspects of education and the student's (or his family's) right to privacy. Such tests, whether administered by federal, state, or private researchers and evaluators or by local school officials, will continue to be scrutinized by the courts. Even as to those tests which survive such scrutiny, it is likely that a sufficiently informed consent by parents and by students will be required by the courts.

First amendment rights of free association and privacy rights of teachers: The private lives of teachers have more of an effect on their job security than is true of most professions because of the often-stated belief that the teacher is a role model responsible for shaping young minds. In one recent case, a teacher was dismissed for living with a male who was not her husband.[318] The teacher argued that the dismissal violated her constitutional rights of privacy and freedom of association. The court, however, declared that "the state is entitled to require teachers to maintain a properly moral scholastic environment" in view of its independent "interest in the well-being of youth" as well as its interest "in preserving the right of parents to control the upbringing of their children."[319] These interests, under *Pickering*, are to be weighed against the teacher's right to privacy. Moreover, as the court noted, it is not even clear that the Constitution "afford[s the teacher's] life style some protection."[320]

In one recent case, school employees were successful in asserting a separation between their private lives and their public lives as school employees.[321] The school had dismissed one plaintiff and had refused to hire the other as teachers' aides because of a policy against employing unwed mothers. The Fifth Circuit found the policy to be without any rational relation to the objective of creating a scholastic environment conducive to the moral and intellectual development of its students and created an invidious discrimination on the basis of sex, in violation of the equal protection clause. The court also found that the due process clause was violated by the irrebuttable presumption that *present* immorality followed from a past act--unwed motherhood.

Federal role: There has been relatively little litigation in the area of the student's right of privacy or access to student records. With regard to the latter issue, Congress, with the enactment of the Family Educational Rights and Privacy Act of 1974 and the implementing regulations drafted by HEW, has stepped into the vacuum and all but preempted the field hitherto occupied--if at all--by state legislation. The one area concerned with the student's right to privacy where, in the future, federal courts may have an impact is that concerned with psychological tests, assessments, and evaluations that elicit personal and family data on personality and socioeconomic status.

The teacher's right of privacy is considerably less protected than that of an ordinary citizen. Where the teacher's sexual *conduct* is seen as a threat to the integrity of the educational system, that threat usually justifies the teacher's dismissal.[322] The decisions in this area thus do not impose on school authorities any new burdens that would have significant impact at either the state or federal level.

2. Other Substantive Constitutional Rights of Students and Teachers

a. Freedom of expression and association. The recent court decisions concerned with substantive constitutional rights of students such as freedom of expression and association do not have a direct impact on federal policies. In one sense, however, these decisions as well as those concerned with the procedural due process rights of students when being disciplined--by imposing limits on the ways in which the school system can operate--*indirectly* affect government policies. The constraints within which school officials must act and the costs which these court decisions may impose on the system are factors of which federal policymakers should be aware.

Freedom of expression: The leading case on the First Amendment rights of public school students is *Tinker v. Des Moines Independent Community School District*,[323] decided by the Supreme Court in 1969. Several high school students who had violated the school's regulation prohibiting the wearing of black armbands while on school premises were suspended. The Supreme Court held that the wearing of an armband (symbolically to protest the Vietnam War) was a form of pure speech,

which was entitled to protection under the First Amendment, even though exercised by students on school premises. The school officials had argued that the wearing of armbands was banned because those with opposing viewpoints might become upset, causing a tense and disruptive atmosphere. The Court stated, however, that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[324] In order for school officials to be able to limit such expression, they must be able to show that the action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[325] Hence, the Court laid down the following standard regarding the exercise of First Amendment rights in the school:

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[326]

But any conduct that does involve "substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[327] The Court did not, however, articulate any standards for determining what showing is required in order to find "material and substantial interference." Thus, the lower courts have developed varying standards as they have applied the *Tinker* principles to cases involving newspapers, leaflets, buttons, and after-school political clubs or organizations.

The law with regard to the dissemination of student newspapers, including "underground" newspapers, is that school authorities can control and regulate the time, place, and manner of dissemination as long as the regulations are not used so as to stifle the student's First Amendment rights. School authorities have frequently required that before any literature is disseminated, it must be submitted to obtain authorization. When confronted with such prior restraint regulations, most courts take a very restrictive view of the extent to which school officials can control the content of student publications. Where courts have permitted prior restraints, they have required them to be accompanied

by adequate procedural safeguards.[328] Several federal appeals courts have held that school officials cannot require *prior* approval under *any* circumstances without violating the First Amendment's prohibition of censorship.[329]

The courts have taken as restrictive a view of sanctions imposed after publication as they have of prior restraints. A college student was expelled for distributing an underground newspaper which the Board of Curators found indecent. The Supreme Court found the actions of the state university to be unconstitutional, stating that "the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[330]

In summary, there has been an increase in judicial protection of the First Amendment rights of students to express themselves through student newspapers, whether underground or school-sponsored, or through symbols such as armbands and buttons. As long as the material being disseminated does not substantially disrupt or materially interfere with school activities or is not obscene, the power of school authorities to control the content of such publications is slight.

Freedom of association: The rights of students to organize groups and clubs and to use school facilities has become a well-litigated issue in recent years. In *Healy v. James*, a case involving college students who sought to establish a chapter of Students for a Democratic Society (SDS), the Supreme Court held that "[t]he College . . . may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[331] The Court stated that the burden of proving the likelihood of disruption was on the administration.

Lower courts, in dealing with high school organizations and clubs, have followed *Healy*. One such case involved high school students who sought recognition of their organization, which was organized in part to discuss political issues. When the principal refused, the students went to court, and the court held that in the absence of any threat to the orderly operation of the school, "to deny recognition to a student group for the reason that it advocates 'controversial' ideas is patently unconstitutional."[332]

Demonstrations: The general rule is that protests and demonstrations which are disruptive are not privileged under the First Amendment; protests which are not disruptive are protected. The First Amendment "does not give individual students the right to disrupt openly the educational process in order to press their grievances."[333]

In summary, with regard to shaping the kinds of rules and regulations which affect student expression and association, the courts have taken an active role, narrowly circumscribing the area within which school authorities can act. Unless there is or will be substantial disruption of school activities, students have great leeway. Even then, the possibility of disruption must be more than merely speculative and the burden of showing the imminence of substantial disruption falls upon the school authorities. The extent to which federal education policies are affected by this recent judicial trend is slight. It is, however, yet another area where the power of school officials has been curtailed significantly.

First amendment rights of free speech for teachers: If the school board has dismissed, transferred, demoted, or disciplined its employees for constitutionally impermissible reasons or has failed to provide the constitutionally required procedural safeguards, then its actions can be overturned. In the absence of evidence of these grounds, the employee has the very heavy burden of proving that the board's actions are an abuse of discretion or arbitary, capricious, or malicious, or not based on substantial evidence--a burden the employee can meet only rarely. Even where school board actions are challenged by teachers on the ground that they involve unconstitutional infringements upon their rights to freedom of speech and association, the initial burden is upon the teacher to establish that the school board's action was in fact based on constitutionally impermissible reasons.

Teachers have brought suit claiming that their contracts were not renewed in retaliation for their exercise of their First Amendment rights. The "balancing test" promulgated in *Pickering v. Board of Education*[334] in 1968 still appears to be the touchstone for lower courts. In *Pickering*, the Supreme Court indicated that the government has legitimate interests as an employer that differ from its interests in regulating the speech of the general public. The problem, therefore,

is to arrive at a balance between the right of the teacher as citizen, to comment upon matters of public concern and the interest of the state as employer in promoting the efficiency of the public services it performs through its employees.[335] The Court, in a footnote, suggested that the state's interests might outweigh those of the teacher where either discipline by immediate superiors or harmony among co-workers was in issue,[336] and lower courts have often seized upon this to rule against teachers who have claimed that they were being penalized for exercising their right of free speech.

Two recent cases indicate how the lower courts have attempted to apply this "balancing test." In a case arising in Connecticut, a teacher who participated in the distribution of leaflets prepared by an underground student organization and containing several defamatory statements about the principal was dismissed for "misconduct," for her insubordination in failing to obey orders of the principal, for distributing the leaflets in violation of school regulations, and for circulating defamatory statements.[337] The court, citing *Pickering*, proceeded to weigh the teacher's First Amendment interests against the interest of the state in operating an orderly school system. In balancing these interests, the court considered the following factors: the question of harmony and confidence among co-workers, the degree of falsity of the statements, the place where the leaflets were distributed, the impact of the statements on staff and students, and whether the board was solely influenced by the plaintiff's conduct as teacher or acted in retaliation for the plaintiff's exercise of protected rights.[338] The court found the statements to be false, highly damaging, and intended to foment conflict, and thus ruled against the teacher.

The second case also involved a claim that the dismissal of a probationary teacher was in retaliation for exercise of her First Amendment rights.[339] In this case, the Tenth Circuit found that the nonrenewal of the teacher's contract was predominately related to her having encouraged the publication of an underground student newspaper. The court held that this was a constitutionally protected activity, and thus the plaintiff could not be penalized for engaging in such an activity. The court, acknowledging that under *Pickering*, the state has valid interests as an employer in regulating the speech of its employees, nevertheless felt

that in this case, the state's interests were outweighed by the teacher's constitutional rights. The crucial element of the case--the key to the plaintiff's success--appears to be the clear absence in the record of any showing that the teacher's activities with the newspaper impeded her performance in the classroom or interfered with the regular operation of the school generally.

A related First Amendment right claimed by teachers is that of "academic freedom"--the right to choose one's teaching method and teaching materials contrary to the wishes of school supervisory officials, the school board, parents, or the legislature. There are only a few cases which have indicated that secondary school teachers have such a right,[340] although one recent writer has sought to demonstrate the inadequacy of the reasoning in those cases.[341]

b. Personal appearance regulations

Hair-length regulations: The basic question with regard to school board regulation of personal appearance is whether a student has a federal constitutional right to govern his own appearance. Among the constitutional protections that have been asserted are the First Amendment's freedom of symbolic expression, the Ninth Amendment's "unenumerated rights," the Fourteenth Amendment's due process and equal protection, or the penumbras of the First, Fourth, Fifth, and Fourteenth Amendments. The issue of whether a male student attending a public school has a constitutionally protected right to wear his hair in any manner he pleases has thoroughly divided the federal circuit courts. Five circuits have voted affirmatively on this issue,[342] five negatively,[343] and the D.C. Circuit has yet to address the issue. The Supreme Court has contributed substantially to this stalemate by its repeated refusals to review such cases. The Supreme Court, however, has decided a hair regulation case concerning policemen. The plaintiff in that case alleged that the maximum hair length regulation violated his First Amendment freedom of expression and his Fourteenth Amendment guarantees of due process and equal protection. The Second Circuit held that the "choice of personal appearance is an ingredient of an individual's personal liberty" and that the police department had "failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote."[344] The Supreme Court reversed, stating that the hair regulation must be "considered

in the context of the county's chosen mode of organization for its police force."[345] The burden was on the plaintiff to show that the regulation was irrational and arbitrary and therefore a deprivation of his liberty. The majority found that either a "desire to make police officers readily recognizable to members of the public, or a desire for the *esprit de corps* which such similarity is felt to inculcate within the police force itself," is a rational justification.[346] Whether this rationale will be applied in the context of the school system is not yet clear.

Dress codes: Some courts that have held that hair length regulations impinge upon a constitutionally protected right have suggested that a dress code might *not* be unconstitutional, as clothes, unlike hair length, can be changed after school.[347] Other jurisdictions have struck down dress codes as infringing upon a personal liberty protected by the Fourteenth Amendment unless there is an outweighing state interest to justify the restriction.[348]

As with some of the other areas of students' rights, the greatest impact of the hair length and dress code cases on school systems stems from the frequency of litigation and its concomitant costs, although the number of cases seems to have dropped off recently. Because of the conflicting decisions, it is difficult to predict the outcome of such suits in advance.

### 3. Student Discipline and Procedural Due Process

Corporal punishment: The principal sanctions used by school officials for student violations of rules and regulations are corporal punishment, suspension, and expulsion. The issue of corporal punishment has recently been challenged on substantive constitutional grounds as well as on procedural due process grounds--that is, that the use of corporal punishment violates the Eighth Admendment's prohibition against cruel and unusual punishment. The lower courts are divided on this point, some holding that depending on the severity of the punishment, the age of the student, and other circumstances, corporal punishment may violate the Eighth Amendment.[349] By contrast, some courts have flatly held that the Eighth Amendment does *not* apply in a civil context,[350] noting that if the punishment is excessive, the student has a remedy in a tort or criminal action, not federal constitutional law. The Supreme Court will consider this issue this Term.

Several cases have raised the issue of the *parent's* right not to have his child corporally punished. It has been argued that the Constitution protects the right of the parent to send his child to a school where he will be free from the infliction of corporal punishment.[351] Thus, a state should be required to present a powerful countervailing interest to overrule the interest of a parent in his children. However, in *Baker v. Owen*, a three-judge district court in North Caroline held that the parental right being asserted is overcome by a showing that the policy of permitting corporal punishment furthers a *legitimate* rather than a compelling state purpose.[352] This position was summarily affirmed by the Supreme Court.[353]

Apart from whether there is a *substantive* constitutional right to be free from corporal punishment, the *Baker* court required that certain *procedural* safeguards be followed in administering corporal punishment. Without these safeguards, said the court, the use of corporal punishment by school authorities would be an unconstitutional deprivation of the student's Fourteenth Amendment right not to be deprived of liberty without due process of law. The *Baker* court reasoned that there is a constitutionally protected liberty interest of "personal security," and thus corporal punishment could not be inflicted arbitrarily. The *Baker* court set up three requirements:[354] (1) except for those acts of misconduct which are "so anti-social or disruptive in nature as to shock the conscience," corporal punishment may never be used unless the student was informed beforehand that specific misbehavior would occasion its use; (2) the teacher or principal may only corporally punish a student in the presence of a second school official who must be informed beforehand and in the student's presence of the reasons for the punishment; and (3) the school official inflicting the punishment must provide the child's parents, upon request, a written explanation of his reasons and the name of the second official present. The court drew the line at requiring counsel or other more elaborate procedural safeguards because to do so would be to "destroy its value, as the essence of corporal punishment is swift and tangible wages for one's transgression."[355] The Fifth Circuit, however, has held that there are *no* constitutionally mandated procedural standards "for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended."[356] The courts are thus clearly in disagreement as to whether procedural

safeguards are required for the administration of corporal punishment. Until the Supreme Court decides the Fifth Circuit case this Term, the issue will remain unresolved.*

Suspensions and expulsions: *Goss v. Lopez*[357] decided by the Supreme Court in 1975,[358] was concerned with whether when school authorities remove a student from school, either temporarily or permanently, they are constitutionally obligated to provide some kind of "due process of law." And if a student is constitutionally entitled to procedural due process, how much process is due? In other words, what are the necessary procedural safeguards which school officials must provide before a student can be deprived of his education? The *Goss* Court's response to these questions established the following: (1) a state that chooses to provide public education may not withdraw the right "absent fundamentally fair procedures;" (2) a student's property interest or right in education is such that a 10-day deprivation resulting from his suspension from school is not *de minimis;* (3) procedural due process, in the case of a 10-day suspension, requires "that the student be given oral or written notice of the charges made against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story;" (4) notice and hearing should "as a general rule" *precede* removal from school, although "[t]here need be no delay between the time 'notice' is given and the time of the hearing."[359] The majority went on to state what was *not* invariably required: "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call . . . witnesses to verify his [the student's] version of the incident." In other words, "truncated trial-type procedures" are not required in most cases involving brief disciplinary suspensions.[360]

There are a number of important questions left unanswered by *Goss*, however, with which school administrators must cope. Lower court cases provide some help in answering these questions, but there is as yet no definitive response. One such question concerns the *property interest* in education recognized in *Goss*, the deprivation of which, under the Fourteenth Amendment, requires procedural safeguards. Is it the right to participate in any aspect of the school program or is it the program in its entirety? The language of *Goss*--"total exclusion from the educational process"--suggests that procedural safeguards are mandated only when a student's deprivation is absolute and not when a student is removed from his English

*Since this chapter was written, the Supreme Court in *Ingraham v. Wright*, has held that corporal punishment in the schools is not a violation of the Eighth Amendment, nor are procedural safeguards required before it is administered.

class and sent to a study hall or is barred from physical education classes for the remainder of the semester. It is probable that there will either be a substantial amount of litigation on this issue or school officials, in order to avoid the *Goss* requirements, will resort more frequently to sanctions such as in-school detention halls or exclusion from student clubs and extracurricular activities. At some point, the impact of exclusion from several school programs could be functionally equivalent to removal from school. The few lower court cases decided since *Goss* do not help answer the question of where that point is, as they have dealt only with the relatively easy case where a student was excluded from only *one* activity, and one that is not deemed central to the academic process.[361]

The *Goss* majority found a liberty as well as a property interest entitled to Fourteenth Amendment protection. This liberty interest of which the student may not be deprived "without due process of law" concerns the student's reputation--his interest in keeping his name free from any stigma. According to the Court, the infringement is the potential damage to the student's standing with teachers and his fellow pupils and the interference with future employment and opportunities for higher education that might result from the notation of the disciplinary action on his record. Thus it is possible that a disciplinary action relating even to one aspect of the educational process, if recorded, may have a sufficiently harmful impact to require the imposition of some procedural safeguards.

The second question is whether very short suspensions (e.g., less than three days) are affected by *Goss*. *Goss* notes that "as long as a property deprivation is not *de minimis*, its gravity is irrelevant,"[362] but the opinion does not say that *any* exclusion, no matter how short the period, exceeds the *de minimis* threshold. Is a student who is suspended for half a day constitutionally entitled to due process? Does it make a difference if the student, as a result of the suspension, misses a physical education class and two periods of study hall or if, instead, he misses a final examination in chemistry?[363]

Finally, precisely what kind of notice and hearing are mandated by *Goss*? How much more process is due for a suspension of *over* ten days or for an expulsion? The most the Court says on this point is that "[l]onger suspensions or expulsions for the remainder of the school term, or

permanently, may require more formal procedures."[364] Moreover, the Court suggests that in certain "unusual" circumstances, even in the case of a short suspension, more procedures than are outlined in *Goss* may be required.

Given the broad mandate of *Goss* that students must be afforded "*some* kind of notice" and "*some* kind of hearing," the lower courts have been struggling with the adequacy of the process afforded in particular circumstances.[365] The failure to define the boundaries of these requirements may result either in perfunctory notice and hearings, and thus a watering down of the constitutional guarantee, or substantial litigation on a case-by-case basis over the nature and extent of the notice and hearing afforded.

Costs: The costs of due process hearings--in dollars, man hours, and other more intangible aspects[366]--may be considerable. One of the principal questions raised by *Goss* is from where are the funds to be diverted to pay for the court-mandated due process hearings? What programs might be affected--special education or the regular educational program, early childhood or secondary education, remedial reading or vocational education? What impact will the requirement of due process hearings have on the demands on staff time? Or will school officials find the cost of removing disruptive children to be so great that they will be allowed to remain in the classroom, acting as disruptive influences and thus having a detrimental effect on the education of the remainder of the class? On the other hand, school administrators may undercut any impact of the decision by adhering to the form rather than the substance of the quite minimal procedural requirements of *Goss* or by resorting to other sanctions in order to avoid the *Goss* requirements.

Federal role: As noted earlier, little direct impact on federal policies and programs seems likely from court intervention into questions of the substantive constitutional rights of students. It is in the area of procedural due process rights that the federal courts are likely to have the greatest impact on the schools, although the extent of the impact is unclear. The failure to define the requirements of *Goss* may result in perfunctory notice and hearings, diluting the constitutional guarantee, or it may result in a substantial increase in litigation, on a case-by-case basis, over just what process is due. Thus the costs may be *de minimis*

or considerable. Indeed, the sum of all the due process requirements imposed on school systems by recent court decisions and by federal legislation--e.g., for the assignment to classes for slow or retarded students or the imposition of certain sanctions--may soon engulf the institution of education unless state or federal governmental help is provided both in the form of technical assistance (e.g., counsel) and financial assistance.

4. Procedural Due Process Rights of Teachers

If a tenured teacher is dismissed from his position, his due process rights entitle him to a notice, a hearing, and an explanation of the reasons for his loss of employment. On the other hand, nontenured, probationary teachers are generally not entitled to such procedural safeguards prior to dismissal, the theory being that they have no property right in continued employment that is protected by the due process clause of the Constitution.[367] The Supreme Court held that only if a nontenured teacher was able to establish either that he had a "property" interest in his teaching position or that his "liberty" had been curtailed as a result of his dismissal, would he be entitled to procedural safeguards upon termination of his employment. The Court, in *Board of Regents v. Roth*,[368] defined a *property interest* as a "legitimate claim of entitlement" created either by state law or "existing rules *and understandings*." *Perry v. Sinderman*[369] indicated that such a claim could even be derived by implication from an employer's words and conduct in light of the past employment practices of the school district and the circumstances surrounding the particular employment situation. All this meant, however, was that the nontenured teacher who was able to show that the circumstances surrounding his appointment "vested" in him a "property right" was entitled to *notice* of the nonrenewal of his appointment and a hearing.

Some lower courts, in attempting to apply these principles, have held that continuous employment over a lengthy period is the equivalent of tenure,[370] while other courts have not.[371] Where there has not been employment for a substantial period, the teacher who is challenging the failure of the board to rehire him must show not only that reemployment is the standard practice but also that he personally was specifically assured that he would be rehired.[372]

This past Term, however, in *Bishop v. Wood*,[373] the Supreme Court

indicated that it will not readily imply a property interest sufficient to require procedural due process. In that case, a policeman who had served the requisite probationary period and then an additional four months as a "permanent" employee, was terminated without a hearing. The Court held that the sufficiency of the employee's claim to a constitutionally protected property interest in employment must be decided in reference to *state law*. Since state law construed the city ordinance as providing that no entitlement or property interest in employment was created, the employee "held his position at the will and pleasure of the city."[374] Thus, the Court has stressed the necessity of examining state law to determine whether the particular circumstances of an employment situation give rise to a constitutionally protected property interest, and whether the "procedures" provided in the state law are all the "process" that is due under the Constitution when the employee is deprived of his "property."[375]

A nontenured teacher may also be able to challenge his dismissal as infringing upon a "liberty interest" in his reputation in the community. In *Roth*, the Court held that a teacher's *liberty* is curtailed when his dismissal is based on a charge that might "seriously damage his standing and associations in his community" by jeopardizing his "good name, reputation, honor, or integrity."[376] Mere dismissal does not infringe upon that liberty interest so as to require due process procedures. A deprivation of liberty occurs only where the dismissal or nonretention of a teacher so stigmatizes him as to foreclose his opportunities for future employment or substantially damage his standing in the community.

The Supreme Court indicated that even where dismissal is based on charges suggesting serious character defects, the charges must be *publicly* known before the dismissal will be found to infringe upon constitutionally protected liberty interests of teachers. In *Bishop v. Wood*, despite the fact that the plaintiff was discharged as a policeman on the grounds of insubordination, "causing low morale," and engaging in "conduct unsuited to an officer," since there was no public disclosure of the reasons, there was no liberty interest at stake[377] and he was not constitutionally entitled to an opportunity to clear his name, even though the allegedly false charges could be passed on to prospective employers.[378]

Once a teacher has established a constitutionally protected interest in his position, to what specific procedural safeguards is he entitled?

The Supreme Court has held that such a teacher would be entitled to a hearing "where he could be informed of the grounds for his nonretention and challenge their sufficiency."[379] Most lower courts, in reviewing the procedures by which teachers have been dismissed, have held that some statement of the charges and notice of hearing must precede the actual hearing.[380]

A question that is frequently litigated is whether the school board is an impartial tribunal before which the hearing should be held. In general, only when the teacher is able to show actual bias on the part of the board will the court require that a separate tribunal be convened.[381] The Supreme Court has recently confirmed this view. In the *Hortonville* case,[382] after negotiations between the school board and the union had broken down, members of the teachers' union went on strike in violation of Wisconsin law. The school board conducted individual disciplinary hearings for each striking teacher and then voted to terminate the teacher's employment. The teachers argued that an impartial decision-maker was needed. The Supreme Court found that in the absence of "personal animosity" on the part of board members, the board's prior role as negotiator did not disqualify it from deciding that, in order to maintain uninterrupted classroom work, teachers striking in violation of state law should be discharged.

Impact on federal policies: With regard to the procedural due process rights of teachers, the recent Supreme Court case of *Bishop v. Wood* appears to have watered down the guarantees by giving greater deference to state law than previously. There, the Court held that a public employee had no constitutional right to a pretermination hearing unless local law or his contract so stipulated, even if he were fired for reasons which were false and these reasons, if disclosed, would damage his reputation. The *Hortonville* case also gives deference to state and local law and to local officials in due process proceedings for public employees. As Chief Justice Burger stated in the *Hortonville* majority opinion:

> Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law.[383]

Even where the courts have held that certain procedural safeguards--such as notice and a hearing--are constitutionally required before a teacher or administrator can be dismissed, the impact on school systems in terms of costs and manpower still will not be nearly as great as that attributable to the due process hearings accorded students, either under the Constitution[384] or statutes.[385] These developments may have greater impact, at least potentially, on those policies concerned with teacher evaluations and the desirability of removing the less competent teacher in favor of the more competent. Even here, while the notice and hearing requirements may function as something of a constraint in getting rid of an incompetent teacher, that constraint has always been present in many state statutes.

5. Liability of School Officials

The impact of many of the judicial decisions concerning various constitutionally protected rights of students and of teachers will depend in large part on the willingness of lower courts to find school officials liable in damages for failing to accord students and teachers their constitutional rights. The Supreme Court, in *Wood v. Strickland,*[386] held that a school board member (and presumably other school officials) "is not immune from liability for damages . . . if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected" and in so doing, he acted in "disregard of the student's *clearly established* constitutional rights."[387] Only violations of "clearly established rights" or of "settled, indisputable law"[388] are grounds for damage actions. Exactly when a constitutional right is "clearly established" was left unanswered. The major question, then, is to what extent the burden is on school authorities to know what the state of the law is and to seek out legal advice before they act. The only guidance from the Supreme Court is that while school officials must be aware of the "clearly established" constitutional rights of their students, they are not "charged with predicting the future course of constitutional law."[389]

Only a few lower courts since *Wood v. Strickland* have had occasion to consider the issue of damages for violations of a student's constitutional rights.[390] One such case arose in the Fifth Circuit when a student was denied admission to the public high school in his area because he

refused to participate in ROTC. His claim was that this violated his freedoms of religion and speech. The court, after reviewing several Supreme Court cases on religious belief,[391] decided that even though the plaintiff might ultimately have been successful in his constitutional claims, there was a "lack of constitutional certitude in this area," and

> [a]bsent such certitude, *Wood* dictates that damages may not be imposed on school board members. In the absence of authoritative decisions from the *Supreme Court*, from *this court*, or even from *other circuits*, we hold as a matter of law that the Board did not violate Sapp's 'clearly established constitutional rights.'"[392]

In another case, the plaintiffs had been excluded from playing soccer because of hair length. In dismissing the immunity issue, one judge concluded that the right to wear hair at a chosen length was not clearly established since "the circuit courts are divided almost evenly, . . . and the Supreme Court has not addressed the question."[393]

A case that *did* find sufficient constitutional certitude involved college students dismissed from thier positions as editors of a school newspaper in violation of their First Amendment rights.[394] The Fifth Circuit, citing several Supreme Court cases as well as Fifth Circuit cases regarding control of the content of student publications,[395] awarded nominal compensatory damages against the president of the university. The court found that the president did not seek legal advice prior to his actions and that his intention to serve the best interests of the school was not a defense to the claim for compensatory damages.

Taking the Court's requirement in *Goss v. Lopez*[396] that due process be afforded students before they are suspended or expelled together with the *Wood v. Strickland*[397] decision, what will the probable impact on the school system be? The *Goss* majority states that "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions,"[398] implying that the decision will have very little impact in terms of time or money. We already know, however, that the introduction of due process hearings in certain circumstances has been quite costly, and the "brooding omnipresence" of *Wood v. Strickland* may make administrators actually give more process than is due in order to avoid possible liability. Moreover, while *Goss* requires some kind of notice and some kind of hearing to be

afforded students facing a less than 10-day suspension, "more formal procedures" may be required for longer suspensions.[399]

The dissent sees the likely impact of the *Wood* decision somewhat differently. Elected or appointed citizens without legal experise, who provide unpaid, voluntary service on boards of education, may be unlikely to seek out such positions in the future, to the detriment of the school system. According to the dissenting opinion, school officials will have to have a "unique competency in divining the law."[400] Concern has recently been expressed regarding the possible refusal of insurance companies to write liability policies to cover school board members.[401] If this is true, then this fact, coupled with the *Wood* decision, may mean people will be less enthusiastic about running for a school board seat in the future. Again, no *direct* impact on federal policies will result from *Wood v. Strickland* and its progeny. Instead the impact is at most indirect, stemming from the constraints that may be placed on local school systems, particularly with regard to discipline.

## C. COLLECTIVE BARGAINING

In the last few years, there has been a substantial increase in state legislation and in court decisions affecting public employee collective bargaining. Collective bargaining for public employees and particularly for teachers is a growing force. There are significant differences among the states, however. Some states have enacted no public employee collective bargaining legislation at all.[402] Some states *prohibit* collective bargaining between teachers (or any public-sector employee) and the school board (or other public agency); some states *require* collective bargaining with an exclusive bargaining agent; and some states lie somewhere in the middle with a "meet and confer" law.[403] Generally, "meet and confer" laws require school boards to meet with all organizations representing teachers, and matters on which they confer are, under some laws, not reduced to binding contracts. In some states, even though there is no public-sector bargaining statute, the *judiciary* has ruled that public-sector employees may bargain collectively.[404] Similarly, in some "meet and confer" states, courts have ruled that negotiating, not just meeting and conferring, is required and that understandings must be reduced to written, binding agreements.[405]

Acceptance of the concept of public-sector unions came quite late to many states. Prior to 1965, only one state--Wisconsin--had a public-sector

collective bargaining law, and a few states still retained statutes *prohibiting* public employees from joining a labor organization. In 1969, a three-judge district court in North Carolina held that interference with the fundamental right to join a labor organization constituted an infringement of the freedoms of speech and association protected by the First Amendment and struck down such a prohibition in that state's constitution.[406] However, while courts will protect the freedom of teachers to organize despite the absence of statutory authorization, they will not extend this protection to a group organized for purposes of a strike.[407]

Most jurisdictions that have enacted statutes which authorize collective bargaining require that the school board (or other public agency) negotiate with an exclusive bargaining representative. This sets up a conflict--one that does not occur in the private sector--between the government agency's statutory duty to conduct business openly and to hear the views of the public and the principles of labor law, which require private negotiations by bargaining representatives. In *City of Madison Joint School District No. 8 v. W.E.R.C.*,[408] the Madison school board, in accordance with local law, held a public meeting at which a representative of a minority group of teachers presented arguments in opposition to an agency shop agreement then under negotiation. The state supreme court held that by hearing the arguments, the board violated its duty to bargain with the exclusive agent. The First Amendment interests in the freedoms of speech and petition of the individual school teachers, who are also citizens speaking at a public meeting like other citizens, had to give way to the labor law principle of exclusive representation in bargaining. The Supreme Court of the United States reversed, holding that in the particular case--where a nonunion teacher was not seeking to bargain and was not authorized to enter into an agreement on behalf of any teachers--curtailing the teacher's speech was not justified. Even though his speech was directed toward the subject of pending negotiations, he was speaking at a public meeting not only as an employee but as a citizen. At such a meeting, any discrimination between speakers on the basis of their employment or the content of their speech[409] is prohibited by the First Amendment. The concurring opinion emphasized that the First Amendment

would *not* prohibit the state from limiting attendance at an actual collective bargaining session or from preventing minority teachers from speaking at such a session.[410]

There are two principal issues in the collective bargaining area: (1) the extent to which school boards can legally "bargain" or "negotiate" with teachers' organizations, (that is, what are managerial prerogatives and hence nonmandatory subjects of bargaining), and (2) the extent to which school employees may resort to the strike to bring pressure on their boards of education to subscribe to the positions held by their organizations.

Several theories have permeated the debate on whether there should be public-sector unionism and if it is permitted, its scope. One theory, based on the idea of sovereignty, is that the state employer possesses the sole power to fix the terms and conditions of employment. Any organized effort to interfere with this power through the collective bargaining process is at odds with the concept of sovereignty.[411] A growing number of state legislatures have been persuaded, however, that if state governments can waive immunity to suit, they can voluntarily enter into collective bargaining agreements.

A second theory involves delegation--a government may not delegate any of its authority over matters properly within its discretion nor may it abdicate any of its responsibility to private parties.[412] Absent statutory authority, then, school boards could not engage in collective bargaining.[413] The delegation doctrine has more recently become a factor in determining the *scope* of bargaining--preserving certain managerial prerogatives for the school board. The courts are in utter disarray as to what are negotiable items and what must be reserved to the discretion of a school board. Some courts narrowly construe "wages, hours, and other terms and conditions of employment" to *exclude* such items as class size, teacher assignment, teacher's aides, elementary school conferences, planning periods, and the school calendar;[414] others have *required* school districts to negotiate on any disputed matter significantly *related* to wages, hours, and working conditions, even though the matter may also relate to management prerogatives. Thus, "wages, hours, and other terms and conditions of employment" has been construed to *include* as mandatory items of bargaining such items as class size, teacher assignment, classroom preparation time, professional improvement,

and the school calendar.[415] Some subjects have been held to be permissible but not mandatory subjects of bargaining. Other items, however, *must* be decided by the board unilaterally, or, according to the courts, there would be an unlawful delegation of the board's statutory authority. Determining the category to which an item belongs--mandatory subject of bargaining, permissible subject of bargaining, managerial prerogative--may in part depend on the particular state statute involved.

With regard to the other major issue--the mechanisms for persuasion which public-sector employees have--only four states have statutes expressly permitting strikes by teachers or other public employees.[416] Even in these states, courts have sharply limited the circumstances under which strikes can take place. Typically, the statute permits a strike by public employees so long as it does not threaten the health and safety of the public.[417] In a recent Hawaii case, the court interpreted such a statute as prohibiting strikes, inasmuch as

> The threatened strike, if engaged in, will result in substantial and irreparable harm to the school children who have a right to an education, to the public which has a right that such education be provided and to the State Department of Education which has an obligation to provide such education.[418]

Another court found that not only the inconveniences to the public and to students, but also the loss of state subsidies because of lost days which could not be made up, were of sufficient danger to the public to warrant prohibiting strikes.[419] A teachers' strike in Philadelphia was held to be a threat to the health, safety, or welfare of the public because, in addition to jeopardizing state aid, there was the possibility of increased gang activity and an additional expenditure of $133,000 per day for extra police protection.[420] Given such broad grounds for enjoining strikes, the statutory right to strike can be rendered almost meaningless.

Somewhat perversely, however, the Michigan Supreme Court has *refused* to enjoin a teachers' strike, absent evidence of violence or irreparable injury, in the face of a clear statutory prohibition against strikes by public employees.[421] The court stated that it was following

state public policy, which was against the issuance of injunctions in labor disputes--ignoring any distinction between public-sector and private-sector employee strikes. School teachers who participate in an illegal strike, however, may be terminated by the school board. In a case decided last Term by the Supreme Court,[422] a teachers' association argued that because the school board had participated in the negotiations which had precipitated the strike, the board was not an impartial body when it made its decision to terminate the employment of the teachers. Thus, they claimed, their Fourteenth Amendment rights of due process were violated. The Court found that among the board's statutory powers is the power to employ and dismiss teachers. How best to halt the interruption of classroom work was a policy judgment to be made at the board's discretion. Disciplining the teachers was merely incidental to this decision. The Court thus attempted to leave "the balance of power in labor relations where the state legislature struck it . . . ."[423] In the absence of any evidence to the contrary, the Court presumed that the board, guided by the public policy of providing education, acted in a disinterested manner.

One difficulty, however, is that even when strikes are enjoined by the court under a law clearly prohibiting public employee strikes, teachers have continued to strike. Statutory penalties have included the loss of the union's dues checkoff privilege, daily fines against the striking union and against individual strikers, and the jailing of union leaders.[424] Despite these severe penalties, strikes have continued.[425] Some laws have penalties that are so draconian that they are seldom used--such as placing striking employees on probation or stripping them of their tenure or seniority rights.[426]

Federal role: Despite the substantial variations among states, the general trend seems to be toward developing procedures to deal with public employees that are comparable to those followed in the private sector. This movement toward eliminating the differences in the treatment of public- and private-sector employees culminated with the introduction of a bill to amend the National Labor Relations Act to extend collective bargaining rights to state and local employees.

While one might favor a simple, national, uniform treatment for public and private employees in the area of municipal trash collection

or transit system operations, the institution of education is significantly different. Although teachers are not only dedicated public servants but are also employees with their own set of interests and needs, including claims for adequate compensation, decent working conditions, adequate sick leave and disability benefits, and retirement plans, many issues which are bargained about in an adversary, two-party proceeding with only "labor" and "management" present are issues of educational policy.[427] Hence they are of concern not just to the two parties but to parents, community groups, and citizens.[428] It thus seems more difficult in education than in other areas to superimpose a private-market model of bargaining on public-sector bargaining.

Despite these problems, the trend is toward treating public school employees more like private-sector employees. The principal route sought by proponents of this trend, however--to enact a national law establishing full collective bargaining rights for state and local employees, possibly by amending the National Labor Relations Act to include public employees--may be precluded by the Supreme Court's decision in *National League of Cities v. Usery*.[429] This case attacked the constitutionality of the 1974 amendments to the Fair Labor Standards Act, which extended the minimum wage and maximum hour requirements to nearly all public-sector employees. The Court found that to determine the wages to be paid employees retained to carry out governmental functions, the hours those employees are to work, and the compensation to be paid them for overtime work, is to engage in "functions essential to [the] separate and independent existence" of the states and held that Congress cannot abrogate the states' plenary authority to make such determinations.

The 1974 amendments were not challenged on the ground that the activity being regulated by the federal government was not interstate commerce and hence not within Congress's power to regulate under the commerce clause. The Court *assumed* that the activities touched on interstate commerce, and that Congress did not, therefore, lack the affirmative grant of legislative authority. Rather, the theory was that the Constitution prohibits Congress from impinging on the attributes of state sovereignty. Congress may not bring about the "forced relinquishment of important [state] governmental activities."[430]

In the view of the majority, the application of the minimum-wage, maximum-hour amendments would

> significantly alter or displace the States' abilities *to structure employer-employee relationships* in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions or administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'[431]

The Court has, however, indicated some limits to the scope of the decision. First, *Maryland v. Wirtz*, decided in 1968,[432] was expressly overruled in *National League* but *Fry v. United States*,[433] decided only last year, was left standing. The former decision held that the Federal Labor Standards Act was applicable to employees of state schools and hospitals. The latter held that the Economic Stabilization Act of 1970 was constitutional as applied to the temporary freezing of the wages of state and local government employees. The Economic Stabilization Act was seen as an emergency measure designed to counter the severe inflation that threatened the economy, and was, according to the majority, drafted in such a way that it did not "interfere with the States' freedom beyond a very limited, specific period of time," nor did the freeze displace "state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves."[434] Thus, the limits to the decision seem to be that the "state sovereignty" doctrine will be superseded only in emergency or exceptional circumstances, as when the country is faced with "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall."[435] On the other hand, with respect to schools and hospitals (in *Wirtz*) and police and fire departments (in *National League*), "each provides an integral

portion of those government services which the states and their political subdivisions have traditionally afforded their citizens."[436]

There are two possible grounds for distinguishing a federal law allowing public-sector employees to organize and bargain collectively from the law held unconstitutional in *National League*. Neither of these is particularly strong.[437] First, a so-called "process" law might not be affected by the *National League* decision, inasmuch as a law merely requiring states to allow public employees to organize and bargain collectively where they now are unable to do so does not force the relinquishment of some state and local governmental activities in order to comply with federal dictates. The concern in *National League* was that the minimum-wage/overtime-compensation law would distort state and local spending priorities and hence policy choices, while a law simply requiring states to engage in the process of collective bargaining under federal jurisdiction does not. However, the *National League* majority's concern with the 1974 amendments is that they will "significantly alter or displace the States' abilities to *structure* employer-employee relationships." Congress may not withdraw from the states "the authority to make those fundamental employment decisions" involved in discharging their function or furnishing public services. More importantly, while it can be argued that the National Labor Relations Board merely supervises the *machinery* of collective bargaining, it really has a substantive input--as, for example, when it decides what is a mandatory subject of collective bargaining--which could clearly interfere with state priorities. It is difficult to believe that the Court, which struck down a federal minimum wage law on the ground that it forced states to alter policies relating to "those fundamental employment decisions," would permit a law, grounded in the commerce clause, which would require states and municipalities to recognize unions, provide for the collection of union dues, impose compulsory arbitration, etc.

The majority opinion in *National League* suggested another possible basis for distinguishing a federal collective bargaining law applied to public-sector employees from a federal minimum wage law. The Court noted that reserved for future decision was whether a federal law affecting "integral operations" of state governments, which was enacted

under Congress's power under Art. I, § 8, cl. 1 (the Spending Power), would be constitutional.[438]

A case decided in 1947, *Oklahoma v. United States Civil Service Commission*,[439] had held that "the offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans" is not federal coercion. That case had challenged a federal law which conditioned federal funds on state employees' relinquishing active involvement in state politics if their jobs were partly funded by federal funds.[440] If this case, which held that such a condition was not an unconstitutional interference with "state sovereignty," is still good law, then a federal law which conditions the grant of federal funds (e.g., revenue sharing money) upon compliance with public-employee collective bargaining provisions might also be constitutional. Even if the relation between such a condition and revenue sharing funds is too diffuse, there are other programs where such a condition would have a more direct relationship--e.g., the grant of Title I ESEA money to a state could be conditioned on the state's accepting the jurisdiction of the National Labor Relations Board over its public school employees.

While it can be argued that a state has a "choice" in this situation that it does not have when Congress imposes a minimum wage under its commerce clause power--i.e., it can forego federal funds rather than accept public employee collective bargaining--is that enough of a distinction to make it an *un*constitutional interference with "state sovereignty" when collective bargaining is forced on the states under Congress's commerce power, yet constitutional when it is the condition for receiving federal funds? On the other hand, if the Court should find Congress's Spending Power to be limited in the same way as its power to regulate commerce, the impact on federal educational policy would be staggering. In other words, if education is a government service "which the states and their political subdivisions have traditionally afforded their citizens"--as the Court suggested when it overruled *Maryland v. Wirtz*--Congress's power to attach some presently used conditions to exercises of the Spending Power could be sharply restricted. It seems unlikely, however, that the Court meant to apply the *National League of Cities* principle so broadly.

In sum, it is not clear whether the Court would uphold the distinc ions attempted to be drawn between the minimum-wage/maximum-hour/overtime compensation law held unconstitutional in *National League* as applied to the states, and federal legislation granting collective bargaining rights to public employees. Because of this doubt, efforts to pass such legislation in the near future are likely to diminish while efforts at the state level to get collective bargaining laws adopted are likely to intensify. Thus, collective-bargaining law may be left with the states--whose laws "vary from the progressive to the reactionary"--at a time when there is an overwhelming growth in public unionism and the number of public employees, and when even the more "progressive" states have generally failed to provide adequate machinery for dispute resolution. Whether or not *National League* will prevent the federal government from attempting to develop more uniform and more effective procedures remains to be seen. Moreover, as it becomes clear within the states that the question is no longer *whether* school authorities will negotiate with their employees, but *how* they will negotiate and on what issues, litigation will increasingly focus on the broader issue of who will control what decisions about education.

## III. SUMMARY AND CONCLUSIONS

### A. THE COURTS AND THE POLITICAL INSTITUTIONS

As the legislative and executive branches of the federal government have become more significantly involved in education, the two major objectives have been to achieve greater educational equity for certain groups neglected by society and to stimulate educational reform and innovation. While the amount of federal money appropriated for elementary and secondary education is quite small in proportion to the total expended annually by state and local governments, the impact is far larger than the dollar amount would indicate because the funds are concentrated on specific priorities. Congress has the constitutional authority to mandate certain policies as the condition for receiving federal funds. Thus, the federal government can provide to states or localities funds that are used to implement desired policies (such as innovative supplemental centers); funds which act as an incentive to states to initiate reform (such as developing school finance equalization plans); and funds which are used to accomplish other policy objectives (such as curriculum development or teacher retraining in a district undergoing desegregation). If states and localities fail to meet certain conditions, federal funds can be withheld or terminated. Some statutes, such as the Buckley Amendment, terminate *all* federal funds for violation of their provisions; some, such as Title I of ESEA, are merely internal--i.e., for violating the provisions of the program, *that* program is terminated; and some, such as the Education for All Handicapped Children Act, terminate funds both internally and externally. The federal government's enforcement mechanisms are quite limited, however, being either so weak as to be useless, or so draconian as to be employed only rarely. And some districts still refuse to accept any federal money, with the consequence that in those districts, the federal government has no leverage whatever in accomplishing its equity or reform objectives.

Do the federal courts help implement the policies promulgated by the executive and legislative branches or are they working at cross purposes with these political branches? One reason why minorities and other

aggrieved groups have turned to the courts is to attain the educational equity the other branches are unable to bring about, either because they seldom invoke enforcement mechanisms available to them or because the mechanisms when employed are restricted in their impact. Thus, in this sense, federal courts are but a part of the arsenal used to implement federal policies.

The efforts of the courts have been directed primarily toward the protection of individual freedom and the attainment of equality. When violations of the Fourteenth Amendment's equal protection or due process clause or the First Amendment's freedom of speech or establishment of religion clause are alleged, the courts must decide the case before them. Thus, where on occasion the courts seem to run counter to the other two branches, it is in part because one task of the judiciary is to protect "discrete and insular minorities" from the majoritarian institutions.

Courts also have intervened in a number of areas only after the legislative or executive branches of the federal government or state and local governments have failed to carry out their constitutional duties. At the end of a lengthy opinion (118 pages) dealing with student segregation, personnel segregation, unequal distribution of resources, and the tracking and testing of students, Judge Skelly Wright states in a "Parting Word":

> It is regrettable, of course, that in deciding this case the court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.[441]

Thus at times the judiciary must intervene in the area of education, even if in doing so, it impinges on the autonomy of educational authorities.

B. LIMITATIONS OF THE JUDICIAL PROCESS

What limits should there be to the areas in which the courts intervene and how they intervene?

(1) When courts enter the field of education, they often find themselves involved in a type of litigation which is not traditional. Here the concern is not with past facts--who did what to whom--but rather with the effect of certain remedies to be implemented in the future. To determine the appropriate remedy, courts must examine social science data. Courts need assistance in coping with the data litigants provide and they need to know what other data--data the litigants *fail* to provide--are relevant. Now and in the past, judges have resorted to masters, experts, and commissions to assist them in acquiring data and information not provided by the parties. This has not always produced the best results. As Judge Wright has had occasion to point out, the "experts" (in that case, economists brought in by both parties) are not always as helpful to a judge as they might be. Among the reasons for this are that:

> They do not begin from a common data base, disagree over crucial statistical assumptions, and reach different conclusions . . . . [T]he studies by both experts are tainted by a vice well known in the statistical trade--data shopping and scanning to reach a preconceived result; and the court has had to reject parts of both reports as unreliable because biased."[442]

In some situations, however, even a panel of "neutral" social scientists may not be helpful. Such a situation occurs when social scientists either do not agree to the research findings or the conclusions to be drawn from those findings. Yet the court cannot wait until the controversies are resolved; it must act on "its own common sense approach"[443] to settle the dispute before it.

(2) When the parties before the court frame the issues, or even when the court relies upon its own experts or masters, the full impact of the suit may not be realized. Courts need assistance in assessing the *broader* impacts of their remedies, to ascertain if possible which remedy has the least adverse impact on those groups *not* party to the litigation and yet achieves just results for plaintiffs whose constitutional rights have been adjudged violated. Perhaps a "judicial impact

statement" prepared by a panel of social scientists and other appropriate persons is needed on alternative remedies and their effects. Such a panel might, for example, attempt to estimate what is involved in the District of Columbia's providing an education "appropriate to [each handicapped child's] needs"--the cost, the educational impact, the effect on other programs, the availability of supporting services, etc.--as well as estimate the impact of alternative remedies.

(3) Courts need to know what they *cannot* do. For example, educators do not now know how to equalize educational outcomes. For this reason, courts, even with the assistance of "experts," are not in a position to do any better. Educators are divided over the efficacy of ability grouping. Ought the courts, then, to get involved if it is determined that ability grouping is not simply a subterfuge for resegregation? Neither heterogeneous nor homogeneous grouping ought to be elevated to a constitutional principle at present, nor should the decision as to whether "mainstreaming" or special education classes is the best *educational* approach for the mentally handicapped.

Certain reforms in education--such as voucher plans, performance contracting, or school site budgeting and management--must come from the legislature and not the courts. The judiciary can, however, provide generalized standards or guidelines, and it can judge the success of such programs as voucher plans in meeting those standards. Moreover, the judiciary must always be able to remedy particular violations of constitutional rights.

In sum, courts must continue to redress specific inequities, such as the suspension or expulsion of students for exercising their First Amendment right of free speech or the deliberate use of testing and tracking to bring about a resegregated school system. But the judicial branch is not the only federal institution which can seek educational equity for minorities and the disadvantaged. Congress can also enact programs to aid certain groups who are confronted with barriers to equal educational opportunity and who are overlooked or not deemed of high priority by state and local governments. In such a case, Congress would be working *with* the courts to achieve greater educational equity. Congress can also enact programs which provide incentives to states to correct inequities (such as disparities in resources among their school

districts) themselves or it can adjust current federal programs that tend to undercut state attempts to correct inequities. Congress can also encourage or assist states to act *before* the courts have acted; if the courts have already acted, it can assist the states to achieve compliance with court orders more effectively and efficiently than the states could on their own. This monograph has shown some of the restrictions that the courts have imposed on how federal legislation, aided by executive regulations, has addressed or is likely to address certain educational issues. A few programs--by no stretch of the imagination an exhaustive list--have been suggested as alternative ways in which Congress and the executive could begin to work *with* the courts to accomplish the objectives of greater educational equity and reform.

## NOTES

1. "The Congress shall have the power (1) to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ." U.S. CONST. Art. I, § 8.

2. *See* Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127 (1947).

3. *See* S. REP. No. 146, 89th Cong., 1st Sess. (1965), Elementary and Secondary Education Act of 1965. As the report points out, education was singled out for special attention in the Northwest Ordinance of 1787. *Id.* at 4.

4. 20 U.S.C. §§ 401 *et seq.* (1970). The enactment of this law was triggered by the successful launching of Sputnik in 1957 by the Russians. The only major federal aid-to-education program prior to 1958 was the aid to federally impacted areas, first enacted in 1950 and renewed repeatedly since then. 20 U.S.C. §§ 236 *et seq.* (1970), *as amended* (Supp. IV, 1974).

5. 20 U.S.C. §§ 236 *et seq.* (1970).

6. Based on 1975-76 estimated expenditures for public elementary and secondary education, taken from NATIONAL CENTER FOR EDUCATIONAL STATISTICS, THE CONDITION OF EDUCATION 189, Table 1.21 (1976).

7. *See, e.g.*, Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.* (1970); Education for All Handicapped Children Act of 1975, 20 U.S.C.A. §§ 1405 *et seq.* (Supp. 1976), amending 20 U.S.C.A. §§ 1401 *et seq.* (1974); Bilingual Education Act, 20 U.S.C.A. §§ 880b-13 (Supp. 1976).

8. *See, e.g.*, Title III of ESEA, 20 U.S.C. §§ 841 *et seq.* (1974); Education Professions Development Act (the Teacher Corps), 20 U.S.C. §§ 1091 *et seq.* (1974); Title V of ESEA (grants to improve state and local planning), 20 U.S.C. §§ 861 *et seq.* (1974).

9. *See* THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1977, Appendix 344-52 (1976).

| Aid for Target Groups | 1975 Expenditures (Millions of Dollars) |
|---|---|
| Grants for disadvantaged children (primarily Title I ESEA and Followthrough) | $1,929 |
| Grants for bilingual education | 93 |

| | | |
|---|---|---|
| Indian education | 42 | |
| Education for the handicapped | 200 | |
| Grants for vocational education for students with special needs | 20 | |
| | $2,284 | |
| Emergency School Aid (for desegregating districts)--includes civil rights advisory service | 133 | |
| | $2,417 | Total for Target Groups |
| **Grants for Innovation and Reform** | | |
| Grants for innovation (e.g., strengthening state education departments, dropout prevention) | $ 160 | |
| Right to Read | 12 | |
| Grants for innovation and reform of vocational education | 35 | |
| | $ 207 | Total for Innovation |
| **Other** | | |
| School Assistance in Federally Affected Areas | $ 656 | |
| Library and instructional resources, drug abuse and environmental education, basic vocational education, etc. | 642 | |
| | $1,298 | Total for "General Aid" |
| TOTAL | $3,922 | |

The new Education for All Handicapped Children Act, 20 U.S.C.A. 1405 *et seq.* (Supp. 1976), *amending* 20 U.S.C.A. §§ 1401 *et seq.* (1974), will raise the funding level from the 1975 figure of $200 million to $3 billion over the next six years.

10. *See* Timpane, *Federal Aid to Schools: Its Limited Future*, 38 LAW AND CONTEMP. PROB. No. 3, 493 (1974).

11. *See* § 842 of the Education Amendments of 1974, 20 U.S.C.A. § 246 (Supp. 1975).

12. 20 U.S.C. §§ 1232g *et seq.* (Supp. IV, 1974).

13. J. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS 179 (1968).

14. 20 U.S.C. § 1262 (a)(4)(A)(1970).

15. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970); Economic Opportunity Act, 42 U.S.C. §§ 2701 *et seq.* (1970).

16. 20 U.S.C. §§ 241a *et seq.* (1970).

17. 20 U.S.C. §§ 841 *et seq.* (1974).

18. 347 U.S. 483 (1954).

19. The principal Supreme Court decisions in the area of school desegregation start in 1954 with Brown v. Board of Education (*Brown I*), 347 U.S. 483 (1954); and Brown v. Board of Education (*Brown II*), 349 U.S. 294 (1955); and include Greene v. County School Board, 391 U.S. 430 (1968); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Swann v. Charlotte-Mecklenburg County Board of Education, 402 U.S. 1 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Keyes v. School District No. 1, 413 U.S. 189 (1973); Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976).

20. Epperson v. Arkansas, 393 U.S. 97 (1968).

21. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

22. Wisconsin v. Yoder, 406 U.S. 205 (1972).

23. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

24. Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

25. Lau v. Nichols, 414 U.S. 563 (1974).

26. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

27. Goss v. Lopez, 419 U.S. 567 (1975) (suspensions); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd mem.* 423 U.S. 907 (1975) (corporal punishment).

28. Wood v. Strickland, 420 U.S. 308 (1975).

29. Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

30. Hobson v. Hansen, 327 F. Supp. 844 (D. D.C. 1971).

31. Pennsylvania Ass'n. for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Educ., 348 F. Supp. 866 (D. D.C. 1972).

32. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3rd Cir. 1976); Berkelman v. San Francisco Unified School Dist. 501 F.2d 1264 (9th Cir. 1974).

33. Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (athletics); Della Casa v. Gaffney, Civ. Action No. 171673 (San Mateo Super. Ct., stipulated judgment filed April 11, 1973) (auto shop).

34. Larry P. v. Riles, 502 F.2d 963 (9th Cir. 1974); Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (*en banc*).

35. Peter Doe v. San Francisco Unified School Dist., Civ. No. 36851 (Cal. Ct. App., Aug. 6, 1976) (slip opinion).

36. Pickering v. Board of Educ., 391 U.S. 563 (1968).

37. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

38. United States v. North Carolina, 400 F. Supp. 343 (E.D. N.C. 1975).

39. Thirty-one states have mandatory laws fully or partially covering education personnel. EDUCATION COMMISSION OF THE STATES, '76 UPDATE: COLLECTIVE BARGAINING IN EDUCATION (1976).

40. Since the Constitution and laws of the United States are as much a part of the law of every state as its own local laws and constitution, state courts must also decide cases brought under the federal constitution unless Congress has given the federal courts exclusive jurisdiction over a particular matter.

41. In some cases, litigation and legislation, aided by executive regulations, must work together for there to be any significant impact. For example, while *Brown v. Board of Education* set the proper moral posture for the country regarding segregated education, there was little more than token desegregation in the South until Congress enacted the Civil Rights Act in 1964 and HEW drafted the implementing guidelines and regulations.

42. Wisconsin v. Yoder, 406 U.S. 205 (1972).

43. *See, e.g.*, School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

44. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

45. 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

46. This test is frequently used by courts in reviewing commercial or economic regulations. See McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). *See generally Developments in the Law--Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

47. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). *See generally Developments in the Law--Equal Protection*, *supra* note 46, at 1087-1132.

48. Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972).

49. Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), *supplemented* in 119 N.J. Super. 40, 289 A.2d 569 (1972), *aff'd as modified*, 62 N.J. 473, 303 A.2d 273 (1973); Hollins v. Shofstall, Civ. No. C-253652 (Ariz. Super. Ct., June 1, 1972), *rev'd*, 110 Ariz. 88, 515 P.2d 590 (1973); Sweetwater County Planning Comm'n v. Hinkle, 491 P.2d 1234 (Wyo. 1971), *juris. relinquished*, 493 P.2d 1050 (Wyo. 1972); Caldwell v. Kansas, Civ. No. 50616 (Dist. Ct. Aug. 30, 1972); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973); Spano v. Board of Educ. of Lakeland Central School Dist. No. 1, 68 Misc.2d 804, 328 N.Y.S.2d 229 (Sup. Ct. 1972).

50. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

51. *Id.* at 37.

52. *Id.* at 45.

53. *Id.* at 37.

54. Justice Marshall suggested this course of action in his dissenting opinion in *Rodriguez*. "[N]othing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions." 411 U.S. at 133, n. 100.

55. Robinson v. Cahill, 62 N.J. 473, 509, 303 A.2d 273, 292 (1973).

56. *Cases plaintiffs lost:* Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975) (plaintiffs relied on state equal protection clause as well as education clause); Northshore School District v. Kinnear, 84 Wash.2d 685, 530 P.2d 176 (1974). Olsen v. Oregon (S. Ct. Ore. Sept. 3, 1976) (slip opinion) (plaintiffs relied on state equal protection clause as well as education clause). *Cases still pending:* Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Hartford County Super Ct. 1974) (plaintiffs won in trial court, appeal pending) (plaintiffs relied on state equal protection clause as well as education clause); Board of Education of Levittown v. Nyquist, No. 8208/74 (Sup. Ct., Nassau County, N.Y.); Pauley v. Kelly (Circuit Ct., Kanawha County, W.Va.).

57. Serrano v. Priest, Civ. No. 938, 254 (Cal. Super. Ct., Apr. 10, 1974), *aff'd* (Cal. S. Ct. Dec. 30, 1976) (slip opinion).

58. Horton v. Meskill, 31 Conn. Supp. 377, _____, 332 A.2d 113, 118 (Hartford County Super. Ct. 1974).

59. Levin, *School Finance Reform in a Post*-Rodriguez *World*, NOLPE, CONTEMPORARY LEGAL PROBLEMS IN EDUCATION 156, 172 (1974); *see also* J. CALLAHAN AND W. WILKEN, SCHOOL FINANCE REFORM: A LEGISLATOR'S HANDBOOK 8-9 (1976). "Circuit-breaker" legislation gets its name from the electrical device that cuts off electricity when the circuit is overloaded; similarly, this tax relief provision "cuts in" when the property-tax burden reaches a percentage of family income that the legislature considers excessive. The excess is recovered by the taxpayer either through credit against his state income tax liability or as a direct cash refund if he has no state income tax liability.

60. Levin, *supra* note 58, at 169.

61. *Id.* at 170. *See*, *e.g.*, FLA. STAT. ANN. § 236.081 (Supp. 1974).

62. Levin, *supra* note 58, at 170. *See*, *e.g.*, UTAH CODE ANN. § 53-7-21 (Supp. 1975) (handicapped and vocational students); MINN. STAT. ANN. § 124.17 (Cum. Supp. 1974) (AFDC students).

63. Levin, *supra* note 58, at 168.

64. *Id.* at 168-69.

65. B. LEVIN, T. MULLER, & C. SANDOVAL, THE HIGH COST OF EDUCATION IN CITIES 2 (1973).

66. No. 8208/74 (Sup. Ct., Nassau County, N.Y.) (decision pending). A decision has recently been handed down in Seattle, Wash., which was also tried on an "urban differential" theory. A similar lawsuit is being brought in Cincinnati, Ohio.

67. "Municipal overburden" refers to the noneducational public services which central cities must support out of the property tax, such as police and fire protection or health and welfare services. It is argued that the comparatively high percentage of the property tax is allocated for these services in cities compared to the percentage in many suburban and rural school districts, which are not so heavily burdened by these noneducational expenses, and this may act as a constraint on the tax rate levied for education.

68. *See* Northshore School District v. Kinnear, 84 Wash. 2d 285, 530 P.2d 176 (1974); Olson v. Oregon (S. Ct. Or. Sept. 3, 1976) (slip opinion); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

69. State *ex rel.* Woodahl v. Straub, 164 Mont. 141, 520 P.2d 776 (1974) (reform legislation upheld); Buse v. Smith, No. 75-532 (Wis. S. Ct., Nov. 30, 1976) (slip opinion) (power equalization "recapture" provisions held unconstitutional); Knowles v. Kansas (Dist. Ct. of Chatauqua County) (state's School District Equalization Act of 1973 held unconstitutional; appeal pending); Boothbay v. Longley, No. 75-918 (Kennebec Super. Ct.) (challenging Maine's School Finance Act of 1975; matter pending).

70. The plan includes increased state aid based on a statewide property tax that would not be dependent on the wealth of the district, with a power-equalized add-on. School Support Committee, Recommendations for Public School Support, Nov. 14, 1974.

71. Civ. No. 938,254 (Cal. Super. Ct., Apr. 10, 1974) (slip opinion) at 102.

72. 118 N.J. Super. at 254.

73. For a detailed analysis of this issue as argued in the *Serrano* trial, see McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?* in FUTURE DIRECTIONS FOR SCHOOL FINANCE REFORM 117 (B. Levin ed. 1974).

74. Serrano v. Priest, Civ. No. 938,254 (Cal Super. Ct., Apr. 10, 1974) (slip opinion) at 51.

75. *See* discussion accompanying notes 50 to 52.

76. Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295 (1973).

77. 411 U.S. at 89 (Marshall, J., dissenting).

78. Serrano v. Priest, Civ. No. 938,254 (Cal. Super. Ct., Apr. 10, 1974) (slip opinion) at 59.

79. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).

80. L. 1975, C. 212, N.J.S.A.18A: 7A-1 *et seq.* *See* Tobinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976) (*Robinson V*).

81. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) (*Robinson VI*).

82. N.Y. Times, July 11, 1976, § 4 at 5, col. 2.

83. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §§ 241a *et seq.* (1974), *as amended* (Supp. 1976). *See* Berke, Sacks, Bailey, Campbell, *Federal Aid to Public Education: Who Benefits?* in FEDERAL AID TO EDUCATION (J. Berke & M. KIRST ed. 1972); *See also* J. BERKE, ANSWERS TO INEQUITY 127-61 (1974).

84. Educational Agencies Financial Aid Act, 20 U.S.C.A. §§ 236 *et seq.* (1974), *as amended* (Supp. 1976).

85. 20 U.S.C.A. § 240(d)(1) (Supp. 1976).

86. *See*, *e.g.*, School District of San Diego County v. Rafferty, 300 F. Supp. 434 (S.D. Calif. 1969), *aff'd*, 429 F.2d 337 (9th Cir. 1970); Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968); Douglas Independent School District No. 3 v. Jorgenson, 293 F. Supp. 849 (D.S.D. 1968); Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968).

87. 20 U.S.C. § 240(d)(2)(A) (Supp. IV, 1974).

88. 85 Fed. Reg. 19116 (§ 115.62(b)(1)). The 20 percent disparity requirement may be waived by the U.S. Commissioner of Education if he finds that there are "exceptional circumstances" in the state in question, if expenditures in the state will be no less equalized if impact aid is taken into account than if it is not, if the amount of revenue available to a local school district in the state is not predominantly a function of its own wealth, if the state aid program recognizes the higher need of certain target-group pupils and the higher costs due to cost-of-living differences or to sparsity or density factors, and if the state program is one in which a substantial proportion of funds comes from state rather than local revenues. 85 Fed. Reg. 19116 (§ 115.62(c)).

89. New school finance equalization laws have been passed in over 20 states since *Serrano* was decided in 1971 and several more states are presently considering reforms.

90. An amendment to the regulations has been proposed which would allow the Commissioner to recognize the principle of "fiscal neutrality" as an alternative to the disparity standard, since "power-equalizing" programs can result in substantial disparities in per-pupil revenues between districts. 124 Fed. Reg. 26330. These disparities are the result of local "choice" rather than local wealth, since the level of revenues available would depend on the tax rate chosen by the district and not the property values. The standard would permit a state which has a power-equalized program to take impacted-areas aid payments into account if no more than 10 percent of state and local revenues consisted of "unequalized revenues."

91. 20 U.S.C.A. §§ 1401 *et seq.* (1974), *as amended* (Supp. 1976).

92. *See*, *e.g.*, S. 1539, Elementary and Secondary Amendments of 1973 (introduced by Sen. Pell); H.R. 16, School Finance Act of 1973 (introduced by Rep. Perkins).

93. R. REISCHAUER & R. HARTMAN, REFORMING SCHOOL FINANCE 153-54 (1973).

94. *See*, *e.g.*, S. 1817, National Education Act of 1973 (introduced by Sen. Humphrey) (to reduce tax inequalities); S. 2414, Elementary and Secondary Education Assistance Act of 1973 (introduced by Sen. Mondale) (to reduce expenditure disparities).

95. Education Amendments of 1974, 20 U.S.C.A. § 246 (Supp. 1975).

96. 45 C.F.R. §§ 156.1 *et seq.* (1975).

97. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

98. Note 65 *supra*.

99. 327 F. Supp. 844 (D.D.C. 1971).

100. *But cf.* San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 22 (1973).

101. Brown v. Board of Education of the City of Chicago, 386 F. Supp. 110 (N.D. Ill. 1974).

102. The Board had undertaken various actions, such as imposing a moratorium on voluntary teacher transfers and assigning additional staff to schools with low per-pupil expenditures, aimed at equalizing intradistrict expenditures. *Id.* at 119-120.

103. *Id.* at 123.

104. *Id.*

105. *Rodriguez* suggested that discrimination against those "whose incomes fall below some identifiable level of poverty or who might be characterized as functionally 'indigent'" might be discrimination against a suspect class. 411 U.S. at 19. There was no discussion in *Brown* as to whether the difference between the class in *Rodriguez* (those who live in low property wealth districts) and that in *Brown* (those who live in low income neighborhoods) was of constitutional significance. 386 F. Supp. at 122.

106. 386 F. Supp. at 125.

107. 45 C.F.R. § 116.26 (1975).

108. J. BARATZ, A QUEST FOR EQUAL EDUCATIONAL OPPORTUNITY IN A MAJOR URBAN SCHOOL DISTRICT: THE CASE OF WASHINGTON, D.C. 184 (1975).

109. *Id.* at 164-73.

110. *Id.* at 211.

111. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a *et seq.* (1970), *as amended* (Supp. IV, 1974).

112. J. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY AND JOHNSON YEARS 179 (1968).

113. 421 U.S. 349 (1975).

114. The full test was first articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

115. Lemon v. Kurtzman, 403 U.S. 602 (1971) (Pennsylvania and Rhode Island statutes).

116. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (New York statutes).

117. Board of Educ. v. Allen, 392 U.S. 236 (1968).

118. Everson v. Board of Educ., 330 U.S. 1 (1947). In a recent district court opinion, state aid which provided certain transportation options to school districts for nonpublic school children and not for public school children was held unconstitutional. Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (S.D. Iowa, 1975).

119. 421 U.S. at 371-72.

120. 45 C.F.R. § 116.19(e) (1975).

121. Meek v. Pittenger, 421 U.S. at 364.

122. Wheeler v. Barrera, 417 U.S. 402 (1974).

123. UNITED STATES OFFICE OF EDUCATION PROGRAM GUIDE NO. 44, § 4.5 (1968), reproduced in TITLE I ESEA, PARTICIPATION OF PRIVATE SCHOOL CHILDREN - A HANDBOOK FOR STATE AND LOCAL SCHOOL OFFICIALS, U.S. HEW Pub. No. (OE)72-62, at 41-42 (1971).

124. *Wheeler*, 417 U.S. at 425.

125. Dual enrollment has been used as a means of carrying out joint instructional programs for public and nonpublic school students. Under this system, children who are enrolled in nonpublic schools are released by their schools several times a week to attend special classes in the public schools or in libraries or recreation centers nearby.

126. *See* Wheeler v. Barrera, 417 U.S. 402 (1974). *See also* Special Dist. v. Wheeler, 408 S.W.2d 60 (Mo. 1966).

127. Roemer v. Board of Public Works of Maryland, 96 S. Ct. 2337 (1976). The aid program, in the view of the Court, more closely resembled that found constitutionally acceptable in Tilton v. Richardson, 403 U.S. 672 (1971) (college) rather than that found unacceptable in Lemon v. Kurtzman, 403 U.S. 602 (1971) (elementary and secondary schools).

128. Meek v. Pitzenger, 421 U.S. 349, 366 (1975).

129. *Roemer*, 96 S. Ct. at 2353.

130. 343 F. Supp. 279 (E.D. Pa. 1972) (consent decree).

131. *Id.* at 283 n. 8.

132. *Id.* at 307.

133. 348 F. Supp. 866 (D.D.C. 1972).

134. The Code provides as follows: "The District of Columbia shall provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical, or emotional disability or impairment." *Id.* at 878. Thus the decision has somewhat limited precedential value for a *constitutional* right.

135. *Id.* at 876.

136. 411 U.S. at 37.

137. The North Dakota Supreme Court recently stated with regard to the handicapped that "Federal constitutional questions would arise if there were a *total* deprivation of educational opportunities." In the interest of G.H., 218 N.W.2d 441, 446 (N.D. 1974) (emphasis added).

138. It should be noted, however, that Justice Brennan, in his plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), distinguishes sex, like race and national origin, "from such nonsuspect statuses as intelligence or physical disability," noting that the sex characteristics, like other suspect criteria, "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. Presumably, mental retardation *does* bear some relation to ability to perform.

139. 411 F. Supp. 46 (N.D. Ohio 1976).

140. 343 F. Supp. at 296.

141. *See, e.g.*, Horton v. Meskill, 31 Conn. Supp. 377, _____, 332 A.2d 113, 119 (Super. Ct. 1974); Serrano v. Priest, Civ. No. 938,254 (Cal. Super. Ct., Apr. 10, 1974) (slip opinion) at 30, 33-34, *aff'd* (Cal. S. Ct., Dec. 30, 1976) (slip opinion).

142. *Compare* Dunn, *Special Education for the Mentally Retarded--Is Much of It Justifiable?* 35 EXCEPTIONAL CHILDREN 5 (1968) *with* MacMillan, *Special Education for the Mildly Retarded: Servant or Savant?* 2 FOCUS ON EXCEPTIONAL CHILDREN No. 9, at 1 (1971). A summary of some of the arguments for and against special classes for the retarded is provided in Fink & Glass, *Contemporary Issues in the Education of the Behaviorally Disordered*, in THE FIRST REVIEW OF SPECIAL EDUCATION 137 (L. Mann & D. Sabatino eds. 1973).

143. In PARC, the consent order, affirmed by the court, provided that "placement in a regular public school class is preferable to placement in a special public school class . . . ." 334 F. Supp. 1257, 1260 (E.D. Pa. 1971). *See also* Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

144. The Education for All Handicapped Children Act, 20 U.S.C.A. § 1412(5) (Supp. 1976), establishes a system of priorities, including the requirement that handicapped children be educated in normal settings "to the maximum extent appropriate" and that they be educated in the "least restrictive environment."

145. One commentator has noted that as a result of a court decision in California and the state legislature's enactment of a law shortly thereafter, thousands of Educable Mentally Retarded (EMR) children have been returned to regular classrooms. The commentator points out the problems, however.

> [A] closer look at the situation presents a dismal picture. Children being returned to the regular classes are provided little of the necessary additional support, enrichment, and remedial services which will redress the effects of their prior educational experiences and permit them to function at the level of other students in the regular classes. Apparently, they are not expected to do well, and many will not. It seems certain that the blame for their failure will be placed on the children, rather than on a system that will not modify itself and its resources to meet their particular needs.

Cohen & DeYoung, *The Role of Litigation in the Improvement of Programming for the Handicapped*, in THE FIRST REVIEW OF SPECIAL EDUCATION 270 (L. Mann & D. Sabatino eds. 1973).

146. D.C. CODE § 31-208 (1973).

147. Mills v. Board of Educ., 348 F. Supp. 866, 868 (D. D.C. 1972).

148. Letter from Doris A. Woodson, Assistant Superintendent, Dept. of Special Education, Public Schools of the District of Columbia, July 8, 1976.

149. The budgeted amount is for direct education, supervision, and administration of public school special education programs; it does not reflect such services as transportation, building maintenance, utilities, psychological evaluation, social services, and therapy. Woodson letter, *supra*.

150. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296 n. 53 (1972).

151. Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 63 (1974).

152. Over 60,000 evaluations had to be conducted in Pennsylvania. An elaborate evaluation is said to take from 4-1/2 to 5 hours. *Id.*

153. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

154. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (*en banc*).

155. 96 S. Ct. 2040 (1976).

156. In *Larry P. v. Riles* the court found that the IQ tests used to classify students were culturally biased and thus their use was not "rationally related to the purpose of segregating students according to their ability to learn in regular classes . . . ." 343 F. Supp. at 1314.

157. *But cf.* Paul v. Davis, 96 S. Ct. 1155 (1976).

158. *See, e.g.*, Diana v. State Board of Educ., Civil No. C-70-37-RFR (N.D. Cal. June 18, 1973) (case terminated by stipulated settlement).

159. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

160. 20 U.S.C.A. §§ 1405 *et seq.* (Supp. 1976), *amending* 20 U.S.C.A. §§ 1401 *et seq.* (1974).

161. According to estimates for 1974, $1.8 billion was spent under Title I and $0.5 billion under impacted areas aid for a total of $2.3 billion. NATIONAL CENTER FOR EDUCATIONAL STATISTICS, HEW, DIGEST FOR EDUCATIONAL STATISTICS, 1974 EDITION 131, Table 142 (1975).

162. *See* Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 65 (1974).

163. In addition to the attempt to curtail abuse by limiting the number of children a state may label as handicapped to 12 percent of all school-aged children, the Act provides that no more than one-sixth of these may be classified as special learning disabled. A recent study has shown that teachers have greatest difficulty in determining which children are learning disabled, consistently naming too many as such, although they also *fail* to identify some who are learning disabled. V. Hanby & R. Stiles, An Estimate of the Incidence of Learning Disabled Students in the State of Washington and the Effectiveness of Teachers in Identifying That Population, May 13, 1976. While there is good reason for the Act to limit the number of learning disabled, this could lead to a struggle for limited funds between those primarily concerned with the mentally retarded and those chiefly interested in the learning disabled; such a struggle was signalled in *Frederick L. v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976).

164. 29 U.S.C. §§ 701 *et seq.* (Supp. IV, 1974), *as amended*, 29 U.S.C.A. §§ 701 *et seq.* (June 1976).

165. Proposed HEW Rule § 84.37(7), 41 Fed. Reg. 20309 (1976).

166. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications*, 121 U. PA. L. REV. 705, 762 (1973).

167. Mercer, *Sociological Perspectives on Mild Mental Retardation*, in H. HAYWOOD, SOCIAL-CULTURAL ASPECTS OF MENTAL RETARDATION 287 (1970).

168. 364 F. Supp. 913 (E.D. Pa. 1973).

169. 20 U.S.C.A. § 1415(a) (Supp. 1976).

170. Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CALIF. L. REV. 40, 81 n. 146 (1974).

171. In *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967), the court held that where, because of the density of residential segregation or for other reasons, black children were denied an integrated education, the school system must provide compensatory education "sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all school children." *Id.* at 515.

A number of courts, in ordering the abolition of dual school systems in southern states, have ordered school districts to include remedial education in the plan for black children who had previously attended segregated schools. *See, e.g.*, Miller v. School Dist. No. 2, 256 F. Supp. 3706 (D. S.C. 1966):

> Because the weaknesses of a dual school system may have already affected many children, the court would be remiss in its duty if any desegregation plan were approved which did not provide for remedial education courses. They shall be included in the plan. *Id.* at 377.

*See also* Graves v. Walton County Bd. of Educ., 300 F. Supp. 188, 200 (M.D. Ga. 1968), *aff'd*, 410 F.2d 1152 (5th Cir. 1969). United States v. Plaquemines Parish School Bd., 219 F. Supp. 841, 846 (E.D. La. 1967); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 891-92 (5th Cir. 1966).

172. New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 763 (E.D. N.Y. 1973) (emphasis added).

173. Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975).

174. *Id.* at 959 (emphasis added).

175. Frederick L. v. Thomas, 408 F. Supp. 832, 833-35 (E.D. Pa. 1976).

176. Roos, *The Potential Impact of Rodriguez on Other School Reform Litigation*, 38 LAW & CONTEMP. PROB. 566, 573 (1974).

177. 414 U.S. 563 (1974).

178. 42 U.S.C. § 2000d (1970).

179. > I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any other language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly. 414 U.S. at 572.

The regulations implementing § 601 at no point mention whether there must be any particular proportion of students with a language deficiency before the school district is required to take affirmative action:

> Where inability to speak and understand the English language excludes national-origin-minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students. 35 Fed. Reg. 11595 (1970).

180. *See, e.g.*, Keyes v. School Dist. No. 1, 380 F. Supp. 673 (D. Colo. 1974); Arvizu v. Waco Indep. School Dist., 373 F. Supp. 1264 (W.D. Tex. 1973), *aff'd in part, rev'd as to other issues*, 495 F.2d 499 (5th Cir. 1974); Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd on other grounds*, 499 F.2d 1147 (10th Cir. 1974); United States v. Texas Education Agency, 342 F. Supp. 24 (E.D. Tex. 1971), *rev'd on other grounds*, 467 F.2d 848 (5th Cir. 1972).

181. Keyes v. School Dist. No. 1, 521 F.2d 465, 482 (10th Cir. 1975).

182. Serna v. Portales, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd on other grounds*, 499 F.2d 1147 (10th Cir. 1974).

183. Frederick L. v. Thomas, 408 F. Supp. 822, 835 (E.D. Pa. 1976).

184. Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f) (Supp. IV, 1974).

185. Morales v. Shannon, 516 F.2d 411, 414-15 (5th Cir. 1975).

186. Bilingual Education Act, 20 U.S.C. §§ 880b *et seq.* (Supp. IV, 1974).

187. 45 C.F.R. § 123.01 (1975).

188. Based on estimates of the U.S. Office of Education, Department of Health, Education & Welfare, of children in need of special language programs. The National Center for Educational Statistics estimates that 4,200,000 children between the ages of 4 to 18 speak a language other than English. Information supplied by J. Rendley, Office of Bilingual Education, HEW, telephone conversation, Aug. 10, 1976.

189. Information supplied by J. Rendley, *supra* note 188.

190. Civ. No. 36851 (Cal. Ct. App., Aug. 6, 1976) (slip opinion).

191. Slip opinion at 3.

192. *Id.* at 14 (footnotes omitted).

193. *Id.* at 15.

194. *Id.* at 15-16.

195. Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 758 (1976).

196. Some states, such as California, have adopted legislation which permits students who are able to pass a test demonstrating competency in certain basic skills to leave high school early. CAL. EDUC. CODE § 1260 (West 1975). Other states have adopted legislation which requires a student to pass a test of minimal competency before receiving his high school diploma. A few states have discussed (and some have enacted) minimal proficiency test requirements for earlier grades, in some cases not permitting a pupil to be promoted to the next grade until he passes the test for his current grade. FLA. STAT. ANN. § 76.226 (1976). *See also* MD. ANN. CODE, Art. 77, § 980 (1976).

197. COLO. REV. STAT. § 22-32-109.5 (Supp. 1975).

198. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (*en banc*).

199. N.Y. Times, Mar. 14, 1976, § 1, at 1, col. 4 and 22, col. 1.

200. 347 U.S. 483 (1954).

201. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971).

202. *Id.* at 25.

203. *Id.* at 24.

204. *Id.* at 27-29.

205. *Id.* at 31.

206. *See, e.g.*, United States v. Board of School Comm'rs, 503 F.2d 68, 80 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

207. Milliken v. Bradley, 418 U.S. 717 (1974). Four post-*Milliken* cases where such actions have been found and an interdistrict remedy ordered are Newburg Area Council v. Board of Educ., 510 F.2d 1358 (6th Cir., 1974), *cert. denied*, 421 U.S. 931 (1975); United States v. Missouri, 388 F. Supp. 1058 (E.D. Mo. 1975), *aff'd in part and rev'd in part*, 515 F.2d 1365 (8th Cir. 1975); United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), *aff'd in part and rev'd in part*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975); Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), *aff'd mem.*, 423 U.S. 963, 416 F. Supp. 328 (D. Del. 1976).

208. Pasadena City Board of Educ. v. Spangler, 96 S. Ct. 2697 (1976).

209. *See, e.g.*, Moses v. Washington Parish School Bd., 456 F.2d 1285 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971).

210. Washington v. Davis, 96 S. Ct. 2040 (1976), may have eliminated the racially discriminatory impact test, so that challengers of ability grouping would be confined to proving racial motivation in order to obtain redress.

211. The arguments that have been made, both for and against ability grouping, are summarized in NATIONAL EDUCATION ASSOCIATION, ABILITY GROUPING 8-10 (Research Summary No. 1968-S3).

212. Hobson v. Hansen, 269 F. Supp. 401, 485 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

213. *See, e.g.*, Charters, *Social Class and Intelligence Tests*, SCHOOL CHILDREN IN THE URBAN SLUMS 75 (J. Roberts ed. 1967).

214. *See* CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 130-34 (1974).

215. CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 61 (1975).

216. SOUTHERN REGIONAL COUNCIL AND THE ROBERT F. KENNEDY MEMORIAL, THE STUDENT PUSHOUT: VICTIM OF CONTINUED RESISTANCE TO DESEGREGATION 4 (1974).

217. Tillman v. Dade County School Bd., 327 F. Supp. 930 (S.D. Fla. 1971). *See also* Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973), *aff'd sub nom.*, Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975).

218. Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974).

219. Goss v. Lopez, 419 U.S. 565 (1975).

220. The district court required certain "educational components" (*e.g.*, programs for reading, testing, in-service training, counseling) to be included in the desegregation plan, and directed the State of Michigan to pay 50 percent of the cost of the new programs. The Sixth Circuit held it was

> within the equitable powers of the court to require the State of Michigan to pay a reasonable part of the cost of correcting the effects of de jure segregation which state officials, including the Legislature, have helped to create. Bradley v. Milliken, 540 F.2d 229, 245 (6th Cir. 1976).

The court of appeals also affirmed the district court's order that the state bear 75 percent of the cost of additional buses.

221. Orfield, *How to Make Desegregation Work: The Adaptation of Schools to Their Newly-Integrated Student Bodies*, 39 LAW & CONTEMP. PROB. at 315 (1975).

222. An excellent description of the process of formulating a decree in "public law" litigation and its deviation from the "traditional" process, appears in Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-1302 (1976).

> [A]judicial decree establishing an ongoing affirmative regime of conduct is *pro tanto* a legislative act. But in actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager. *Id.* at 1302.

223. 20 U.S.C.A. §§ 1601-19 (1974), *as amended* (Supp. 1976).

224. Orfield, *supra* note 220 at 339.

225. The most frequently litigated issue is whether the prevailing party can obtain attorneys' fees in proceedings brought against a local education agency for failure to comply with the Emergency School Assistanct Act (ESAA), Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment.

241. 42 U.S.C. §§ 2000e *et seq.* (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e *et seq.* (1970). Title VII makes it

> an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin, . . .

42 U.S.C. § 2000e-2(a) (1970).

Since coverage was extended to teachers only in 1972, there are few Title VII cases in which a teacher has alleged that the school system's actions toward him/her have been racially discriminatory. The Supreme Court has held that in order to meet his initial burden of establishing a prima facie case of racial discrimination, the teacher plaintiff must show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973).

The burden then shifts "to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection," but "the inquiry must not end there" because the employee must "be afforded a fair opportunity to show that . . . [the employer's] stated reason for . . . [the employee's] rejection was in fact pretext." *Id.* at 802, 804.

Of Title VII sex discrimination cases against public school systems, a significant majority are concerned with mandatory pregnancy leave or exclusion of pregnancy-related disabilities from the school system's disability benefits coverage. Most of the nonpregnancy cases concern faculty appointment and tenure decisions at institutions of higher education.

242. Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).

243. *Id.* at 1114.

244. Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

245. United States v. North Carolina, 400 F. Supp. 343 (E.D. N.C. 1975).

246. *Id.* at 351.

226. *See, e.g.*, Board of Education of Cincinnati v. HEW, 396 F. Supp. 203 (S.D. Ohio, 1975). HEW may not, however, withhold ESAA funds solely because in its view a district which is in compliance with a court-ordered plan is insufficiently desegregated. Robinson v. Vollert, 411 F. Supp. 461 (S.D. Tex. 1976).

227. *See, e.g.*, Kelley v. Metropolitan Bd. of Educ. of Nashville and Davidson County, 372 F. Supp. 540 (M.D. Tenn. 1973).

228. > First . . . Congress intended that ESAA funds be used to assist local school boards in meeting the expenses of carrying out student transportation requirements as part of a court-ordered desegregation plan . . .; second, Congress actually rejected an amendment which was virtually identical to the transportation policy adopted by the [federal officials]. *Id.* at 557.

229. 20 U.S.C. § 1228 (Supp. IV, 1974).

230. *See, e.g.*, 20 U.S.C. § 1651 and § 1656 (Supp. IV, 1974), and most of §§ 1701 *et seq.* (Supp. IV, 1974).

231. Carroll v. HEW, 410 F. Supp. 234 (W.D. Ky. 1976).

232. 20 U.S.C. § 1652(a) (Supp. III, 1973), 20 U.S.C. § 1228 (Supp. IV, 1974).

233. 410 F. Supp. at 239.

234. *See* 20 U.S.C.A. § 241e (Supp. 1976) and 45 C.F.R. § 116.17 (1975).

235. Swann v. Charlotte-Mecklenburg Bd. of Educ. 402 U.S. 1 (1971).

236. United States v. Wilcox County Bd. of Educ., 494 F.2d 575 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

237. United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969).

238. Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), *rev'd in part*, 396 U.S. 290 (1970).

239. Wright v. Houston Indep. School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975).

240. Harkless v. Sweeny Indep. School Dist., 388 F. Supp. 738 (S.D. Tex. 1975).

247. *See, e.g.*, Georgia Ass'n of Educators, Inc. v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976); Walston v. County School Bd. of Nansemond City, 492 F.2d 919 (4th Cir. 1974). *Cf.* Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972) (use of cutoff score on Graduate Record Examination).

In *Georgia Ass'n*, the State Board of Education required a minimum score of 1225 on the National Teachers' Examination before a six-year teaching certificate entailing higher pay and greater responsibility could be obtained. The state's asserted purpose in using the scores was to insure that only a person who had gained valuable new knowledge and was a superior or master teacher would earn a T-6 certificate. The court found no rational relationship between the test selected and the end result sought, inasmuch as no empirical studies had ever been made by the board to determine if the 1225 score related to curriculum requirements, superior knowledge, or teacher performance. Indeed, the board's decision to use the test was made with knowledge that ETS had stated that it was an inappropriate instrument for determining pay level or teacher performance. Thus the use of the test was held to be a violation of the equal protection clause.

In *Walston*, requiring a minimum score of 500 on the NTE for retention as a teacher was found to be discriminatory since a proportionately larger number of black teachers were not retained. Upon finding disproportionate racial impact, the court shifted the burden of proof to the defendants, citing the *Griggs* holding that the test "must bear a demonstrable relationship to successful performance of the jobs for which it is used." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

248. 42 U.S.C. § 2000e (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).

249. 96 S. Ct. 2040 (1976).

250. 96 S. Ct. at 2050 n. 12. Following the Supreme Court's decision in *Washington v. Davis*, the State of North Carolina argued that the three-judge district court's ruling in United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975), on the use of the NTE should be reversed because that court had not found that the state had *intentionally* used the test for the *purpose* of discriminating on the basis of race. Raleigh (N.C.) News and Observer, July 1976.

251. "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved . . . ." 96 S. Ct. 2051. The Court went on to note that if deficiencies remained in the "recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that section." *Id.* at 2053-54.

Thus, the Court neither struck down Title VII nor the application of it in Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court simply reversed the Court of Appeals because it "erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it . . . ." *Id.* at 2046.

252. A few cases have arisen when school authorities have affirmatively undertaken to provide access to teaching and supervisory positions for minorities. The issue raised in such cases is whether the use of new criteria to facilitate the promotion of minority members violates the rights of those who had qualified for advancement under the old criteria. In *Council of Supervisory Associations v. Board of Educ.*, 23 N.Y.2d 458, 245 N.E.2d 204 (1969), the New York City Board of Education determined that increased parental and community involvement would help improve the education of disadvantaged, nonwhite students. Feeling that the existing competitive tests for principals were not addressed to the special needs of the schools involved in the new approach, the Board created a new position. Appointments were made from names not included in the original list of qualified applicants for positions as principal. The appointments were challenged by the Council of Supervisory Associations (CSA) on the ground that the positions filled on the basis of race. The New York State court held that while the new position could not be lawfully filled on the basis of race, experience with racial problems could become an objectively measured standard. The appointments were permitted to stand only until the Board created specific and objective criteria for the new position.

In a similar case, the Newark Board of Education had abolished its promotional list for administrative positions and appointed some blacks not on the list. Ten white teachers brought suit under the Civil Rights Act of 1964, alleging that the superintendent of schools racially discriminated against the whites whose names appeared on the abolished promotional list. The Newark School Board argued that conditions within the system had changed drastically since the list was established and that integration of administrative positions would improve the Newark school system. The court specifically rejected the allegation of the plaintiffs that the use of race as a criterion is unlawful regardless of the purpose: "State action based partly on the considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment." Porcelli v. Titus, 431 F.2d 1254, 1257 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

Both *CSA* and *Porcelli* recognize that changes in the criteria used for promotion are valid even if the new criteria are partially based on racial grounds. There must, however, be a real relation between the change in criteria and the evolving needs of the educational system. Once it is determined that a legitimate purpose for the change exists, it is only necessary for the school board to show that its new criteria for promotion are not unreasonable.

253. *See* Craig v. Boren, 45 U.S.L.W. 4057 (Dec. 21, 1976). A number of lower courts, however, have treated sex-based classifications as suspect. *See, e.g.*, Held v. Missouri Pacific R.R., 373 F. Supp. 996 (S.D. Tex. 1974); Daugherty v. Daley, 370 F. Supp. 338 (N.D. Ill. 1974); Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D. N.J. 1973), *aff'd*, 420 U.S. 636 (1974); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973), *rev'd*, 419 U.S. 498 (1974).

254. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Supp. 1974). *See* 45 C.F.R. §§ 86.1 *et seq.* (1975).

255. 20 U.S.C. §§ 1681 *et seq.* (Supp. IV, 1974), *as amended*, 20 U.S.C.A. § 1681 (Supp. 1976). *See* C.F.R. §§ 86.51 *et seq.* (1975).

> No person shall, on the basis of sex, . . . be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from federal financial assistance. *Id.* at §86.51(a)(1).

To date, there are no reported cases which have been brought by teachers under Title IX.

256. 29 U.S.C. § 206 (1970), *as amended*, 29 U.S.C. § 206 (Supp. III, 1973). The Equal Pay Act prohibits an employer from paying discriminatory wages on account of sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). Although employees "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), were initially excluded from the Act's coverage, the exemption was removed by the Education Amendments of 1972. 29 U.S.C. § 206 (Supp. III, 1973). Few cases have been brought by teachers under the Act, and most of those were at the university level.

257. 42 U.S.C. §§ 2000e *et seq.* (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e *et seq.* (1970).

There are a number of employment cases in which teachers have alleged that they were unconstitutionally discriminated against on the basis of age. Most of these cases involve state statutes or school board policies which require teachers to retire at a certain age. The Supreme Court's recent decision in *Massachusetts Board of Retirement v. Murgia*, 96 S. Ct. 2562 (1976), in which a statute mandating the retirement of state police officers at age 50 was upheld as not violative of the equal protection clause, suggests that such constitutional challenges will be unsuccessful in the future. The Age Discrimination in Employment Act, 29 U.S.C.A. §§ 62 *et seq.* (1975), passed in 1967, makes it unlawful for an employer (including state and local governmental agencies)

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . *Id.* § 623(a)(1).

This restriction, however, only applies to individuals between the ages of 40 and 65. Moreover, an employer is permitted to "observe

the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan . . . ." The regulations state that pursuant to such a retirement or pension plan, an employee may be involuntarily retired irrespective of age, 29 C.F.R. § 860.110 (1975). Thus a statutory attack on a fixed retirement age for teachers is likely to be no more successful than a constitutional attack.

258. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 (Supp. IV, 1974) states that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin."

259. Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976).

260. *Id.* at 888.

261. *See* 45 U.S.L.W. 3299 (Oct. 19, 1976).

262. 45 C.F.R. § 86.35 (1975).

263. Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir. 1974). *See also* Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972).

264. 45 C.F.R. § 86.35(b) (1975). Another regulation prohibits schools from "giv[ing] preference to one person over another on the basis of sex, by ranking applicants separately," by "apply[ing] numerical limitations upon the number or proportion of persons of either sex who may be admitted," or "otherwise treat[ing] one individual differently from another on the basis of sex." *Id.* § 86.21.

265. Three unreported cases on vocational education, Della Casa v. Gaffney, Civil No. 171673 (Calif. Super. Ct. 1973); Steward v. Della, Civil No. 134,173 (Calif. Super. Ct. 1972); and Sanchez v. Baron, Civil No. 69-C-1615 (E.D.N.Y. 1971), are discussed in Martinez, *Sexism in Public Education: Litigation Issues*, 18 INEQUALITY IN EDUCATION 5, 6-7 (1974). Another unreported case, Robinson v. Washington, Civil No. 9576 (W.D. Wash. Apr. 6, 1971) is discussed in 24 HAST. L.J. 1191, 1212-13 (1973).

266. 45 C.F.R. § 86.34 (1975).

267. *Id.*

268. *Id.* § 86.36.

269. *See, e.g.*, Shull v. Columbus Municipal Separate School District, 338 F. Supp. 1376 (N.D. Miss. 1972); Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971); Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969).

270. Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973).

271. 45 C.F.R. § 86.40(b) (1975).

272. "Compliance . . . may be effected (1) by the termination or refusal to grant or to continue assistance . . . ." 20 U.S.C. § 1682 (Supp. II, 1972). The substantially identical language of Title VI (for race) is found in 42 U.S.C. § 2000d-1 (1970).

273. "Compliance may be effected . . . (2) by any other means authorized by law . . . ." 20 U.S.C. § 1682 (Supp. II, 1972). *See* 45 C.F.R. §§ 86.71, 80.8(a) (1975).

274. Cannon v. University of Chicago, ____ F.2d ____ (7th Cir. 1976).

275. 42 U.S.C. § 2000c-6 (1970), *as amended* (Supp. II, 1970).

276. In the words of the statute, termination of federal assistance for failure to comply "shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found . . ." 20 U.S.C. § 1682 (Supp. II, 1972).

277. *But see* Stewart v. New York University, No. 74, Civ. 4126 (S.D. N.Y., March 16, 1976).

278. A few cases interpreting Title VI's analogous limitation suggest that the sanctions of Title IX might be restricted to programs that receive federal funds directly. These cases are discussed in Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 108-113 (1974). Title IX *regulations*, however, are clearly intended to extend beyond the programs directly receiving federal funds to *all* educational programs of a system or institution receiving federal funds. The regulations state that "education functions . . . include any service, facility, activity or program . . . including athletics and extracurricular activities." ¶10, 40 Fed. Reg. 24128 (1975).

HEW bases its position on several factors, including its belief

> that athletics constitute an integral part of the educational process of schools and colleges, and, as such, are fully subject to the requirements of Title IX even in the absence of federal funds going directly to athletics. ¶70, 40 Fed. Reg. 24134 (1975).

In addition, Congress, in 1974, required HEW to prepare regulations implementing Title IX which would "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Section 844 of the Education Amendments of 1974 (Pub. L. 93-380). *See* discussion ¶72, 40 Fed. Reg. at 24134. Moreover, Congress implicitly endorsed the Department's interpretation by approving the regulations as written in August 1975.

279. 45 C.F.R. § 86.41(c) (1975).

280. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

281. 29 C.F.R. § 1604.10(b) (1975) provides as follows:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

282. *See*, *e.g.*, Berg v. Richmond Unified School District, 538 F.2d 1208 (9th Cir. 1975); Fabian v. Independent School District No. 89, 409 F. Supp. 94 (W.D. Okla. 1976); Singer v. Mahoning County Board of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974), *aff'd*, 519 F.2d 748 (6th Cir. 1975); Vineyard v. Hollister Elementary Schools, 64 F.R.D. 580 (N.D. Cal. 1974). *But see* de Laurier v. San Diego Unified School Dist., 10 FEP Cases 361 (S.D. Cal. 1974).

283. Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961 (9th Cir. 1975).

284. *Id.*

285. 417 U.S. 484 (1974).

286. 519 F.2d at 964, *quoting* 42 U.S.C. § 2000e-2(a)(2) (emphasis and change in wording added by court). EEOC guidelines promulgated pursuant to Title VII specifically prohibit employers from discriminating between pregnancy-related disabilities and other temporary disabilities in their sick leave plans. 29 C.F.R. 1604.10(b) (1975).

287. General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (Dec. 7, 1976).

288. 393 U.S. 503 (1969); 391 U.S. 563 (1968).

289. First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can

> hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 506 (1969).

290. "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Prince v. Massachusetts, 321 U.S. 158, 170 (1944). *See also* Ginsberg v. New York, 390 U.S. 629 (1968).

291. Teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work." Pickering v. Board of Educ., 391 U.S. at 568.

292. Roe v. Wade, 410 U.S. 113, 152 (1973).

293. *Cf.* Doe v. McMillan, 459 F.2d 1304, 1319 (D.C. Cir. 1972) (Wright, J., dissenting), *rev'd in part and aff'd in part*, 412 U.S. 306 (1973).

294. *See*, *e.g.*, The Privacy Act of 1974, 5 U.S.C. § 552a (Supp. IV, 1974); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (Supp. IV, 1974).

295. *See*, *e.g.*, OR. REV. STAT. § 336.195 (1971).

296. *See* Van Allen v. McCleary, 27 Misc. 2d 81, 211 N.Y.S. 2d 501 (Sup. Ct. 1961) (common law right of access for parents).

297. *See*, *e.g.*, OR. REV. STAT. §§ 44.040, 366.195 (1971).

298. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (Supp. IV, 1974).

299. There are several exceptions to the educational records to which parents and students may have access. 20 U.S.C. § 1232g(a)(4)B (Supp. III, 1974) provides that the term "education records" does not include

> (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.

300. 20 U.S.C. § 1232g(b)(3) (Supp. IV, 1974).

301. 20 U.S.C. § 1232g(b)(3) (Supp. IV, 1974). Organizations conducting studies for educational agencies concerned with developing, validating, or administering predictive tests, or administering student

aid programs, or "improving instruction" are also among the exceptions, *if* the studies are conducted so that the students and their parents cannot be identified personally and if such information is destroyed when no longer needed for the purpose for which it was collected. 20 U.S.C. § 1232g(b)(1)(F) (Supp. IV, 1974).

302. Note, *The Buckley Amendment: Opening School Files for Students and Parental Review*, 24 CATHOLIC U. L. REV. 588, 593-94 (1975). The Buckley Amendment provides a right to challenge and correct inaccurate data contained in student records. 20 U.S.C. § 1232g(a)(2) (Supp. IV, 1974).

303. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).

304. *See* People v. Overton, 24 N.Y. 2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970).

305. Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972).

306. *See, e.g.*, Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970); *In re* Donaldson, 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (1969).

307. One court has held that school officials have a right even to use moderate force against a student in a search of his locker, where the primary purpose of the search is not to obtain criminal convictions but to secure evidence of student misconduct. *In re* Donaldson, 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (1969).

308. Mercer v. State, 450 S.W.2d 715 (Tex. Civ. App. 1970).

309. *See* Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975); State v. Walker, 528 P.2d 113 (Ore. Ct. App. 1974); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971).

310. Picha v. Wielgos, 410 F. Supp. 1214, 1218 (N.D. Ill. 1976). In this case, the court held that under the *in loco parentis* doctrine, school officials, in their interest in the safety of their charges, could attempt to locate and confiscate drugs and, in the course of this, acquire evidence that would be usable in a criminal prosecution or in an adjudication of delinquency. Here, however, the police had been contacted initially and so the standard of probable cause for an actual arrest had to be met to justify the search. The student's rights were violated if the student were searched and the police did not have probable cause to believe that the student was breaking the law. *Id.* at 1220-21.

311. People v. Jackson, 65 Misc.2d 909, 919, 919 N.Y.S.2d 731, 736 (App. T. 1971).

312. State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 593, *cert. denied*, 423 U.S. 1039 (1975).

313. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

314. *Id.* at 916.

315. 364 F. Supp. at 918. The court cited Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973) as sources of the privacy right.

316. *See, e.g.*, Comment, *Protecting the Privacy of School Children and Their Families through the Family Educational Rights and Privacy Act of 1974*, 14 J. FAMILY LAW 255, 259 (1975); note, *Constitutional Law-Right of Privacy-Personality Test Used by School to Identify Potential Drug Abusers Without Informed Consent of Parents Violates Student's and Parents' Right of Privacy*, 27 VAND. L. REV. 372 (1974).

317. > The Court, in balancing the right of an individual to privacy and the right of the government to invade that privacy for the sake of public interest, strikes the balance in favor of the individual in the circumstances shown in this case. In short, the reasons for this are that the test itself and the surrounding results of that test are not sufficiently presented to both the child and the parents, as well as the Court, as to its authenticity and credibility in fighting the drug problem in this country. There is too much of a chance that the wrong people for the wrong reasons will be singled out and counselled in the wrong manner. 364 F. Supp. at 921.

318. Sullivan v. Meade Indep. School Dist., 530 F.2d 799 (8th Cir. 1976).

319. *Id.* at 804.

320. *Id.* at 806.

321. Andrews v. Drew Municipal Separate School Dist., 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 96 S. Ct. 1752 (1976).

322. > There are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category.

Board of Trustees v. Stribblefield, 16 Cal. App.2d 820, 826-27, 94 Cal. Rptr. 318, 323 (2d Dist. 1971).

323. 393 U.S. 503 (1969).

324. *Id.* at 508.

325. *Id.* at 509.

326. *Id.*

327. *Id.* at 513.

328. The Fourth Circuit in Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973), spelled out rather stringent requirements which must be met in order to insure the constitutionality of any system of prior restraints:

> (a) Secondary school children are within the protection of the first amendment, although their rights are not coextensive with those of adults.
> (b) Secondary school authorities may exercise reasonable prior restraint upon the exercise of students' first amendment rights.
> (c) Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.
> (d) A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:
>
> (1) A definition of "Distribution" and its application to different kinds of material;
> (2) Prompt approval or disapproval of what is submitted;
> (3) Specification of the effect of failure to act promptly; and
> (4) An adequate and prompt appeals procedure.

*See also* Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975).

329. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

330. Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670 (1973) (*per curiam*).

331. Healy v. James, 408 U.S. 169, 187-88 (1972).

332. Dixon v. Beresh, 361 F. Supp. 253, 254 (E.D. Mich. 1973).

333. Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438, 442 (5th Cir. 1973). However, when a quiet, orderly, and apparently organized walkout of 29 black students from a high school rally occurred when the song "Dixie" was played, the court held that they could be disciplined, as this was not constitutionally protected dissent and was unreasonable and disruptive. Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972).

334. Pickering v. Board of Educ., 391 U.S. 563 (1968).

335. *Id.* at 568.

336. *Id.* at 570 n. 3.

337. Gilbertson v. McAlister, 403 F. Supp. 1 (D. Conn. 1975).

338. *Id.* at 6.

339. Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975).

340. Epperson v. Arkansas, 393 U.S. 97, 115-16 (1968) (Stewart, J., concurring); Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971) (*per curiam*); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

341. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976). *See* President's Council v. Community School Ed., 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

342. *See, e.g.*, Holsappel v. Woods, 500 F.2d 49 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1231 (1st Cir. 1970).

343. *See, e.g.*, Karr v. Schmidt, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972). In a case involving a college student, however, the Fifth Circuit held that because of the student's maturity and thus the educational institution's diminished role, the balance is in favor of the individual. Only an unusual set of factors can justify requiring that unless a college student's hair is of a certain length he has no right to continue to avail himself of public educational opportunities. The adult's constitutional right to wear his hair as he chooses supercedes the state's right to intrude. Lansdale v. Tyler Junior College, 470 F.2d 659, 663 (5th Cir. 1972) (*en banc*), *cert. denied*, 411 U.S. 986 (1973).

In contrast, the Ninth Circuit stood firm against *both* college and high school students, seeing no dividing line between them. The court declared that hair regulations violated no substantial constitutional rights, rejecting claims based upon equal protection, freedom of expression, and the right of privacy. King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971); Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972). Mr. Justice Douglas, the lone dissenter in the Supreme Court's decision to deny *certiorari* in *Olff*, declared:

> It seems incredible that under our federalism a state can deny a student education in its public school system unless his hair style comports with the standards of the school board . . . . Hair style is highly personal, an idiosyncrasy which I had assumed was left to family or individual control and was of no legitimate concern to the state. 404 U.S. at 1042-43.

344. Dwen v. Barry, 483 F.2d 1126, 1130-31 (2d Cir. 1973).

345. Kelley v. Johnson, 96 S. Ct. 1440, 1445 (1976).

346. *Id.* at 1446.

347. *See, e.g.*, Richard v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970); Copeland v. Hawkins, 352 F. Supp. 1022, 1025 (E.D. Ill. 1973); Dunham v. Pulsifer, 312 F. Supp. 411, 419 (D. Vt. 1970).

348. Bannister v. Paradis, 316 F. Supp. 185 (D. N.H. 1970) (male student wearing dungarees).

349. In *Baker v. Owen*, a three-judge federal district court found that, even assuming that the Eighth Amendment applied to cases involving corporal punishment, two licks with a wooden drawer divider administered to an eleven year old boy "did not approach the level of cruel and unusual." 395 F. Supp. 294, 303 (M.D.N.C.), *aff'd mem.*, 423 U.S. 907 (1975).

350. Ingraham v. Wright, 525 F.2d 909 (5th Cir.) (*en banc*), *cert. granted*, 96 S. Ct. 2200 (1976).

351. *See* Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).

352. "[W]e cannot allow the wishes of a parent to restrict school officials' discretion in deciding the methods to be used in accomplishing the not just legitimate, but essential purpose of maintaining discipline." Baker v. Owen, 395 F. Supp. 294, 301 (M.D.N.C. 1976). *See also* Sims v. Waln, 536 F.2d 586 (6th Cir. 1976).

353. 423 U.S. 907 (1975).

354. 395 F. Supp. at 302-03.

355. *Id.* at 302.

356. Ingraham v. Wright, 525 F.2d 909, 919 (5th Cir.), *cert. granted*, 96 S. Ct. 2200 (1976).

> There is a qualitative difference between an exclusion from the educational process, through suspension, and a routine disciplinary measure such as paddling. The infliction of a paddling, unlike the denial

itself of educational benefits, does not subject the student to a 'grievous loss' for which constitutionally mandated procedural safeguards apply. *Id.* at 918 n. 10.

357. Goss v. Lopez, 419 U.S. 565 (1975).

358. In 1961, in a case involving the expulsion of a student from a state college, the Fifth Circuit held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 390 (1961). Although *Dixon* involved the expulsion of a student from college, the reasoning in this opinion was soon held applicable to expulsion from public elementary and secondary schools as well.

359. 419 U.S. at 574, 576, 581-83.

360. *Id.* at 583.

361. Two lower court cases concerning students who were barred from participating in interscholastic athletics for one year after transferring schools have attempted to deal with the scope of the property in education. Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Dallum v. Cumberland Valley School District, 391 F. Supp. 358 (M.D. Pa. 1975). Neither court found the right to participate in interscholastic athletics to be a constitutionally protected property right. In effect, the "educational process" spoken of in *Goss* was treated as a composite of many activities and it was the composite that was the protected interest, not each separate activity. Neither of these cases, however, involved a question of discipline; rather, a residence rule as applied to *interscholastic* athletics was challenged.

362. 419 U.S. at 576.

363. A case arising in Virginia did hold that due process mandates that certain procedures be followed even where the suspension is for only three days. Kirtley v. Armentrout, 405 F. Supp. 575 (W.D. Va. 1975). *Goss* has also been held to apply to an indefinite suspension whose termination was dependent upon an act within the student's power. Ouimette v. Babbie, 405 F. Supp. 525 (D. Vt. 1975) (seventh grader suspended until she agreed to attend physical education class).

364. 419 U.S. at 584.

365. *See, e.g.*, Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975) (hearing); Alex v. Allen, 409 F. Supp. 379 (W.D. Pa. 1976) (notice and hearing); Kirtley v. Armentrout, 405 F. Supp. 575 (W.D. Va. 1975) (notice).

366. One commentator has summed up the possible intangible impacts of *Goss*. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 851-64 (1976). *See also* 419 U.S. 565, 589-90, 593 (1975) (Powell, J., dissenting).

367. Of course, many states provide some procedural protections for probationary teachers even though there is no constitutional requirement that such safeguards be provided when dismissing non-tenured teachers. Some states require school authorities to inform the teacher of the reasons for his dismissal; other states require, in addition, some sort of hearing.

368. 408 U.S. 564 (1972).

369. 408 U.S. 593 (1972).

370. *See, e.g.*, Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Vance v. Chester County Bd. of Educ., 504 F.2d 820 (4th Cir. 1974).

371. *See, e.g.*, Buhr v. Buffalo Public School Dist., 509 F.2d 1196 (8th Cir. 1974); Wilson v. Pleasant Hill School Dist., 465 F.2d 1366 (8th Cir. 1972).

372. *See* Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973). *But see* LaBorde v. Franklin Parish School Bd., 510 F.2d 590 (5th Cir. 1975).

373. 96 S. Ct. 2074 (1976).

374. *Id.* at 2078 n. 9, *quoting* 377 F. Supp. 501, 504 (W.D. N.C. 1973). In this case, there was no state court construction of the ordinance but an interpretation by a federal district judge based on his "understanding" of state law.

375. *See* Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, ____ CORNELL L. REV. ____ (1977).

376. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

377. 96 S. Ct. 2074, 2079 (1976). Even when one's reputation is damaged publicly, it appears that there may be no "liberty interest" constitutionally entitled to procedural safeguards. Paul v. Davis, 96 S. Ct. 1155 (1976).

378. *Id.* at 2081 (Brennan, J., dissenting).

379. Perry v. Sindermann, 408 U.S. 593, 603 (1972).

380. *See, e.g.*, Vance v. Chester County Bd. of Educ., 504 F.2d 820 (4th Cir. 1974); Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

381. *See* King v. Caesar Rodney School Dist., 380 F. Supp. 1112 (D. Del. 1974).

382. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 96 S. Ct. 2308 (1976).

383. *Id.* at 2316.

384. *See*, *e.g.*, Goss v. Lopez, 419 U.S. 565 (1975).

385. *See* § 615 of the Education for All Handicapped Children Act of 1975, 20 U.S.C.A. § 1415 (Supp. 1976).

386. 420 U.S. 308 (1975).

387. *Id.* at 322 (emphasis added). If he acted with "malicious intention to cause a deprivation of constitutional rights or other injury to the student," he would also be liable. *Id.*

388. *Id.* at 321.

389. 420 U.S. at 322, *quoting* Pierson v. Ray, 386 U.S. 557 (1967).

390. Zeller v. Donegal School District Bd. of Educ., 517 F.2d 600 (3d Cir. 1975); Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975). The *Wood* doctrine has also been held to apply to suits by teachers and other school employees for violations of their civil rights. *See*, *e.g.*, Mims v. Board of Educ. of the City of Chicago, 523 F.2d 711 (7th Cir. 1975); Bertot v. School District No. 1, 522 F.2d 1171 (1975); Shirley v. Chagrin Falls Exempted Village Schools Board of Education, 521 F.2d 1329 (6th Cir. 1975); Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961 (9th Cir. 1975); Morris v. Board of Education of Laurel School District, 401 F. Supp. 188 (D. Del. 1975).

391. Wisconsin v. Yoder, 406 U.S. 205 (1972); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

392. Sapp v. Renfroe, 511 F.2d 172, 178 (5th Cir. 1975) (emphasis added).

393. Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d at 609.

394. Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975).

395. Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972); Bazaar v. Fortune, 476 F.2d 570, *rehearing en banc*, 489 F.2d 225 (5th Cir. 1975).

396. 419 U.S. 565 (1975).

397. 420 U.S. 308 (1975).

398. 419 U.S. at 583.

399. *Id.* at 584.

400. 420 U.S. at 331 (Powell, J., concurring in part and dissenting in part).

401. Education Daily, July 21, 1976.

402. Colorado and Ohio are two states in this category.

403. N.C. GEN. STAT. §§ 95-98 (1975) (prohibits collective bargaining); N.Y. CIVIL SERVICE LAW § 204(2) (McKinney 1973); MICH. COMP. LAWS ANN. § 423.215 (1967) (both require collective bargaining with an exclusive representative); CONN. GEN. STAT. ANN. §§ 10-153d (1967); IDAHO CODE §§ 33-1274, 33-1275 (Supp. 1975) (meet and confer statutes).

404. *See, e.g.*, Chicago Division of Illinois Educ. Ass'n v. Board of Educ. of City of Chicago, 76 Ill. App.2d 456, 222 N.E.2d 243 (1966).

405. *See, e.g.*, National Education Association of Shawnee Mission, Inc. v. Board of Educ., 212 Kan. 741, 512 P.2d 426 (1973).

406. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C.1969). *See also* Board of Education v. Scottsdale Educational Association, 17 Ariz. App. 504, 498 P.2d 578 (1972).

The dismissal of a teacher because of union membership has been held to be an "unjustified interference with teachers' associational freedom violat[ing] the Due Process clause of the Fourteenth Amendment." McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968).

407. Zeluck v. Board of Educ., 62 Misc.2d 274, 307 N.Y.S.2d 329 (Sup. Ct. 1970).

408. 69 Wis. 2d 200, 231 N.W.2d 206 (1975).

409. 45 U.S.L.W. 4043 (Dec. 8, 1976).

410. *Id.* at 4046 (Brennan and Marshall, J.J., concurring).

411. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L. J. 1107, 1108 (1969).

412. *Id.* at 1109.

413. Minneapolis Federation of Teachers Local 59 v. Obermeyer, 255 Minn. 347, 147 N.W.2d 358 (1966). To get around the delegation problem, some state legislation provides for legislative approval of parts of the collective agreements. *See, e.g.*, WIS. STAT. ANN. § 111.92(1) (Supp. 1973).

414. *See, e.g.*, Pennsylvania Labor Relations Bd. v. Mars Area School Dist., ____ Pa. Cmwlth _____, 344 A.2d 284 (1975) (teachers' aides); Board of Educ., South Stickney School Dist. III v. Johnson, 21 Ill. App.3d 482, 315 N.E.2d 634 (1974) (teacher assignments); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (school calendar); Seward Education Ass'n v. School Dist., 188 Neb. 772, 199 N.W.2d 752 (1972) (teacher assignments, class size).

415. *See, e.g.*, Red Bank Bd. of Educ. v. Warrington, 138 N.J. Super. 564, 351 A.2d 778 (1976) (classroom preparation time); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972) (class size); Joint School Dist. No. 8 v. Wisconsin Employment Relations Board, 37 Wis.2d 483, 155 N.W.2d 78 (1967) (school calendar).

416. HAWAII REV. STAT. § 89-12 (1972); OR. REV. STAT. § 243.726 (1973); PA STAT. ANN. tit. 43, § 1101.1003 (1975); VT. STAT. ANN. tit. 21 § 1730 (1975).

417. *See, e.g.*, HAWAII REV. STAT. § 89-12 (1972).

418. Hawaii Public Employees Relations Bd. v. Hawaii State Teachers Ass'n, 54 Hawaii 531, 511 P.2d 1080 (1973).

419. Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Cmwlth. 463, 322 A.2d 767 (1974).

420. Philadelphia Federation of Teachers v. Ross, 8 Pa. Cmwlth. 204, 301 A.2d 405 (1973).

421. School District for City of Holland v. Holland Educ. Ass'n, 380 Mich. 314, 157 N.W.2d 206 (1968).

422. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 96 S. Ct. 2308 (1976).

423. *Id.* at 2316.

424. Board of Educ. of City of New York v. Shanker, 54 Misc.2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967).

425. *In re* Jersey City Educ. Ass'n, 115 N.J. Super. 42, 278 A.2d 206, *cert. denied*, 404 U.S. 948 (1971).

426. Taylor Law, N.Y. CIV. SERV. LAWS §§ 200 *et seq.* (McKinney 1973).

427. At a recent convention, the American Federation of Teachers resolved to "develop contract language providing for the inclusion of labor history in the curriculum." NEA guidelines say that negotiations should include textbook selection and class size, and all such matters that affect the *quality* of the educational system.

Two controversial issues serve to illustrate the problem of distinguishing between issues teachers as employees are concerned

about and issues of educational policy, about which parents and community groups as well as teachers are concerned. The first is class size. Is class size a "condition of employment" or a matter of educational policy? Clearly, aspects of the problem have to do with working conditions--the teacher's work load. But class size is also an issue of educational policy. If the community thought that reduced class size should have a lower priority than other facets of education and there were limited dollar resources, bargaining over class size might distort other educational policy decisions. By way of illustration, in the 1968-70 contract between the Philadelphia School District and the Philadelphia Federation of Teachers, the Board agreed to spend $1,000,000 to reduce the size of classes. Where class size could not be reduced, the same amount of money was to be used to provide supportive services to reduce the teaching load of those teachers whose class size was not reduced.

The right of a teacher to remove a child for misbehavior is clearly a "condition of employment"--his ability to teach the rest of the class or perhaps even his safety is affected by the presence of the disruptive child. The teacher's interest is undeniable, but so is that of students, parents, and community. Some negotiated disciplinary provisions may also focus on proper educational goals--but the union position is unlikely to reflect more than its own self-interest. Other groups, such as parents, may have different views, but if the issue is settled through collective bargaining, such groups have no opportunity to have any input in the decision process. It was this issue that split the Puerto Rican and black communities from the United Federation of Teachers in the 1967 strike in New York City.

428. The public has begun to express its concern about the situation. A law suit brought recently in Philadelphia alleged that the children's best interests are often bargained away in contract negotiations. The suit challenged the bargaining agreement between the Philadelphia School District and the Philadelphia Federation of Teachers, contending that the children's "needs" get lost in the power struggle between the employees and management. A law suit brought by the United Parents Association in New York sought to prevent the board from reducing school time for students (two 45-minute class periods a week were to be cut out of the school day for teacher preparation or free time), as part of its settlement of a teacher strike. These suits question whether collective bargaining is the appropriate mechanism for raising the interests of various community groups, and if it is, at what point should these interests be introduced into the negotiations? The suits were unsuccessful, however.

429. 96 S. Ct. 2465 (1976).

430. *Id.* at 2472.

431. *Id.* at 2474 (emphasis added).

432. 392 U.S. 183 (1968).

433. 421 U.S. 542 (1975).

434. 96 S. Ct. at 2474-75.

435. *Id.* at 2474.

436. *Id.* at 2476. One of the problems with the *National League* opinion is best expressed by Mr. Justice Stevens's dissenting opinion--the difficulty of drawing the line between that federal power to regulate state activities which is permissible and that which is impermissible. It was on this point that Mr. Justice Blackmun concurred (making the fifth vote for the majority). In his view, the decision provided for some balancing so that federal power could be exercised where the federal interest is greater--such as with environmental protection, where state compliance with federal standards would be essential. It is not clear that he could be convinced that a law giving public-sector employees collective bargaining rights would fall within this category. The majority opinion established that Congress's plenary power under the commerce clause is limited by state sovereignty, but fails to make clear what an "attribute of state sovereignty" is (the power to determine the wages and hours of its employees is one), or what the elements of a "function essential to separate and independent existence." *Id.* at 2471.

437. An even more tenuous third ground is the following which is based on the majority opinion's suggestion that if the federal law deals with a national emergency "which only collective action by the National Government might forestall," the "state sovereignty" concerns are superseded. In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which upheld the constitutionality of the National Labor Relations Act, the Court noted that the presence of labor strife was "a matter of the most urgent national concern," since it affected commerce; allowing labor to organize and bargain collectively was *essential* to the prevention of labor strife. The argument here would be that as the number of public-sector employees increases, labor strife could become much more disruptive than such strife in the private sector. However, the *National League* majority's example of a law dealing with a national emergency is the Economic Stabilization Act of 1970, which applied to the *temporary* freezing of the wages of state and local employees. Moreover, the issue in *N.L.R.B. v. Jones & Laughlin Steel Corp.* was whether what was being regulated was "commerce" and thus subject to Congress's plenary authority. The *National League* Court conceded that Congress is regulating "commerce" in applying the minimum wage law to state employees, but held that the plenary power of Congress in the field of commerce is limited by "state sovereignty."

438. 96 S. Ct. at 2474 n. 17. The Court also suggested that a law based on § 5 of the Fourteenth Amendment might be upheld as constitutional. A case recently decided by a federal district court

in Iowa provides an indication of the type of law which would withstand a challenge to its constitutionality when grounded in § 5 of the Fourteenth Amendment. In that case, the Equal Pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d) (1963), were upheld on the ground that even though these provisions were based on Congress's commerce clause power, the intent of the Equal Pay Act was to bar discrimination on the basis of sex, and "[d]iscrimination in pay on the basis of sex is not an attribute of sovereignty within the contemplation of the Tenth Amendment . . . ." Usery v. Bettendorf Community School Dist., 45 U.S.L.W. 2187, 2188 (S.D. Iowa, Sept. 1, 1976). *See also* Usery v. Salt Lake City Bd. of Educ., 45 U.S.L.W. 2155 (D. Utah, Aug. 31, 1976) (§ 5 of the Fourteenth Amendment as an alternate ground for upholding Age Discrimination in Employment Act as applied to state employees).

439. 330 U.S. 127 (1947).

440. The Hatch Act, 5 U.S.C. §§ 1501 *et seq.* (Supp. IV, 1974), has a provision which states that no state or local government employee, if his job is in connection with any activity financed "in whole or in part" by federal funds, may "take any active part in political management or in political campaigns." *Id.* at § 1502(9)(3). If the state or local government fails to remove such an employee, then federal funds in the amount equal to two years of the employee's salary are to be withheld. A member of the State Highway Commission of Oklahoma was elected chairman of the Democratic State Central Committee for Oklahoma. When the U.S. Civil Service Commission ordered the state to remove him from the Highway Commission, the State of Oklahoma brought suit, contending that this section of the Hatch Act, in attempting to regulate the internal affairs of a state, was an invasion of the sovereignty of the states in violation of the Tenth Amendment. The Court held as follows:

> While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case . . . . [T]he conclusion was reached that [the state employee's] active participation in politics justified his removal from membership on the Highway Commission. Oklahoma chose not to remove him. We do not see any violation of the state's sovereignty . . . . Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion . . . . The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare is not unusual. 330 U.S. at 144-45.

441. Hobson v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967).

442. Hobson v. Hansen, 327 F. Supp. 844, 859 (D.D.C. 1971).

443. *Id.*